TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1944

No. 137

PRUDENCE REALIZATION CORPORATION,
PETITIONER,

vs.

JOSEPH W. FERRIS, GEORGE L. LONG AND HENRY LEIFERT, AS TRUSTEES UNDER A DECLARATION OF TRUST DATED AS OF JULY 1ST, 1938, WITH RESPECT TO 307 WEST 36TH STREET (BURNSIDE) FIRST MORTGAGE PARTICIPATION CERTIFICATES, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

PETITION FOR CERTIORARI FILED JUNE 7, 1944.

CERTIORARI GRANTED OCTOBER 9, 1944.

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION—FIRST DEPARTMENT

JOSEPH W. FERRIS, GEORGE L. LONG and HENRY LEIFERT, as Trustees under a Declaration of Trust dated as of July 1st, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, Plaintiffs-Respondents-Appellants,

against

PRUDENCE REALIZATION CORPORATION, Defendant-Appellant-Respondent,

CITY BANK FARMERS TRUST COMPANY and MARTIN S. LINDGROVE as Trustees under the Last Will and Testament of Herman Stutzer, Deceased, Defendants-Respondents-Appellants,

and Irving ZAUDERER on behalf of themselves and other holders of certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, and such other holders as may appear or come in and defend this action, Defendants-Respondents.

Action #1

SOLOMON ZAUDERER, MILTON KIMMELMAN, IRVING ZAUDERER and CHARLES KIMMELMAN, doing business as Kimmelman and Zauderer, on behalf of themselves and all other holders of Prudence Bonds Corporation participating certificates of the 307 West 36th Street (Burnside) First Mortgage Participation Certificate Issue who shall come in and join as parties to this action, Plaintiffs,

against

PRUDENCE REALIZATION CORPORATION and JOSEPH W. FERRIS, HENRY LEIFERT and GEORGE L. LONG, as Trustees under a Declaration of Trust dated as of July 1, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, Defendants

Action #2

[fol. 2] STATEMENT UNDER RULE 234

These are appeals by defendant Prudence Realization Corporation, by plaintiff Joseph W. Ferris, George L. Long and

Henry Leifert as Trustees, and by City Bank Farmers Trust Company and by Martin S. Lindgrove as Trustees, defendants, from an order made herein and entered in the office of the Clerk of the County of New York on the 18th day of November, 1942, denying the motion of defendant Prudence Realization Corporation for an order under Rule 113 of the Rules of Civil Practice dismissing the complaints and striking out the answers interposed herein by City Bank Farmers Trust Company and by Martin S. Lindgrove as Trustees, and directing that judgment be entered herein in favor of the defendant Prudence Realization Corporation.

The notice of appeal of the plaintiffs Joseph W. Ferris, George L. Long and Henry Leifert as Trustees, was served and filed on December 5, 1942. The notice of appeal of the defendant Prudence Realization Corporation was served and filed on December 8, 1942, and the notice of appeal of defendants City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees was served and filed on December 10, 1942.

The defendant-appellant-respondent Prudence Realization Corporation appears by Irving L. Schanzer, its attorney. The plaintiffs-respondents-appellants Joseph W. Ferris, George L. Long and Henry Leifert as Trustees, appear by Charles H. Kriger, their attorney. The defendants-re- [fol. 3] spondents-appellants City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees, appear by Delafield, Marsh, Porter & Hope, their attorneys. Plaintiffs Solomon Zauderer, Milton Kimmelman, Irving Zauderer and Charles Kimmelman, doing business as Kimmelman and Zauderer, appeared in the action by Albert W. Fribourg, their attorney.

There has been no change of parties or attorneys since the commencement of this proceeding.

[fol. 4] In Supreme Court of New York, New York County

Joseph W. Ferris, George L. Long and Henry Leifert, as Trustees under a Declaration of Trust dated as of July 1st, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, Plaintiffs,

against

Prudence Realization Corporation, City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees under the Last Will and Testament of Herman Stutzer, deceased, and Irving Zanderer on behalf of themselves and other holders of certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, and such other holders as may appear or come in and defend this action, Defendants

Action #1

Solomon Zauderer, Milton Kimmelman, Irving Zauderer and Charles Kimmelman, doing business as Kimmelman and Zanderer, on behalf of themselves and all other holders of Prudence Bonds Corporation participating certificates of the 307 West 36th Street (Burnside) First Mortgage Participation Certificate Issue who shall come in and join as parties to this action, Plaintiffs,

against

Prudence Realization Corporation and Joseph W. Ferris, Henry Leifert and George L. Long, as Trustees under a Declaration of Trust dated as of July 1, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, Defendants

Action #2

[fol. 5] Notice of Appeal by Prudence Realization Corporation

Sirs:

Please take notice that Prudence Realization Corporation, defendant in Action No. 1 and Action No. 2, does hereby appeal to the Appellate Division of the Supreme Court, First

Judicial Department, from the order made and entered in the above entitled action and bearing date the 11th day of November, 1942, which said order denied the motion of the defendant Prudence Realization Corporation to dismiss the complaint under Rule 113 of the Rules of Civil Practice, and said appeal is taken from each and every part of said order.

Dated: December 7, 1942.

Yours, etc., Irving L. Schanzer, Attorney for Defendant, Prudence Realization Corporation, Office & P. O. Address, 40 Exchange Place, Borough of Manhattan, City of New York.

To: Charles H. Kriger, Esq., Attorney for Plaintiffs in Action No. 1, 66 Court Street, Brooklyn, N. Y.

Delafield, Marsh, Porter & Hope, Esqs., Attorneys for Defendants, City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees, etc., 20 Exchange Place, New York, N. Y.

Albert W. Fribourg, Esq., Attorney for Plaintiff, Solomon Zauderer, et al., Action No. 2, 205 East 42nd Street, New York, N. Y.

[fol. 6] In Supreme Court of New York, New York County

[Same Title]

Notice of Appeal by City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees, etc.

Sirs:

Please take notice that the defendants, City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees under the last will and testament of Herman Stutzer, deceased, on behalf of this and all other holders of the certificates hereinafter mentioned and as representatives of all such holders, do hereby appeal to the Appellate Division of the Supreme Court, First Department, from so much of the order made and entered in the above entitled action, and bearing date the 11th day of November, 1942, as fails to grant judg-

ment in accordance with the relief demanded in the answer of the above mentioned defendants.

Dated, December 10, 1942.

Yours, etc., Delafield, Marsh, Porter & Hope, Attorneys for Defendants, City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees, etc., Office and P. O. Address, 20 Exchange Place, Borough of Manhattan, City of New York.

[fol. 7] To: Charles H. Kriger, Esq., Attorney for Plaintiffs in Action No. 1, 66 Court Street, Brooklyn, New York.

Irving L. Schanzer, Esq., Attorney for the Defendant, Prudence Realization Corporation, 40 Exchange Place, New York, N. Y.

Albert W. Fribourg, Esq., Attorney for Plaintiffs, Solomon Zauderer, et al., Action No. 2, 205 East 42nd Street, New York, N. Y.

Clerk of the County of New York.

In Supreme Court of New York, New York County

[Same Title]

Notice of Appeal by Plaintiffs Ferris et al.

Sirs:

Please take notice, that the plaintiffs Joseph W. Ferris, George L. Long and Henry Leifert, as Trustees under a Declaration of Trust dated as of July 1st, 1938 with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, plaintiffs in Action No. 1, do hereby appeal to the Appellate Division of the Supreme Court, First Judicial Department, from the order made and entered [fol. 8] in the above-entitled action, and bearing date the 11th day of November, 1942, which said order denied the motion of the defendant Prudence Realization Corporation to dismiss the complaint under Rule 113 of the Rules of Civil Practice, and said appeal is taken from so much of said order as failed to grant judgment to the plaintiffs in said action for the relief demanded in the complaint.

Dated, December 2, 1942.

Yours, etc., Charles H. Kriger, Attorney for Plaintiffs in Action No. 1, Office & P. O. Address, 66 Court Street, Brooklyn, New York.

To: Irving L. Schanzer, Esq., Attorney for the Defendant, Prudence Realization Corporation, 40 Exchange Place, New York, N. Y.

Delafield, Marsh, Porter & Hope, Esqs., Attorneys for Defendant City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees, etc., 20 Exchange Place, New York, N. Y.

Albert W. Fribourg, Esq., Attorney for Plaintiff, Solomon Zanderer, et al., Action No. 2, 205 East 42nd Street, New York, N. Y.

[fol. 9] In Supreme Court of New York, New York County

Present: Hon. Charles B. McLaughlin, Justice

[Same Title]

Order Appealed From

The defendant, Prudence Realization Corporation, having made a motion for summary judgment, and said motion having duly come on to be heard.

Now, upon reading and filing the notice of motion dated the 5th day of June, 1942, the affidavit of William T. Cowin and the affidavit of Irving L. Schanzer, both sworn to the 5th day of June, 1942, together with the exhibits thereto annexed and consisting of agreement, dated June 25, 1927 between Prudence Bonds Corporation and the Bank of America, copy of certificate, guarantee agreement, copies of certificates in portfolio, copy of Plan of Reorganization of The Prudence Company, Inc. and Order of Confirmation; the affidavit of Irving L. Schanzer, sworn to the 22nd day of June, 1942 and the exhibit thereto annexed being copy of Proof of Claim; the affidavit of Ira K. Balsam, sworn to the 22nd day of June, 1942; and upon the summons and complaint in Action #1 and the summons and complaint in Action #2; the answer and cross-complaint of the defendant, City Bank Farmers Trust Company; the answer and [fol. 10] cross-complaint of Realty Associates Securities Corporation; the answer and counterclaim of the defendant, Prudence Realization Corporation, in Action #1; the answer and counterclaim of the defendant, Prudence Reali-

zation Corporation, in Action #2; the answer of the defendant, Prudence Realization Corporation to the cross-complaint of City Bank Farmers Trust Company, the answer of the defendant, Prudence Realization Corporation, to the cross-complaint of Realty Associates Securities Corporation; the affidavit of Joseph W. Ferris, George L. Long and Henry Leifert, sworn to the 19th day of June, 1942, the affidavit of Charles H. Kriger, sworn to the 23rd day of June, 1942, and the exhibits thereto annexed, consisting of Plan of Reorganization of Burnside Issue, dated November 1, 1937, the order confirming the Plan of Reorganization, dated June 14, 1938, the Declaration of Trust, dated as of July 1, 1938, the deposition of W. Allin Bigg taken on June 22, 1942, and the supplemental deposition of W. Allin Bigg taken on July 3, 1942, the exhibit designated the offering sheet and offered at page 4 of the deposition of W. Allin Bigg; the stipulation dated July 7, 1942; the affidavit of Frederic R. Rich, dated the 12th day of June, 1942; and after hearing Irving L. Schanzer, attorney for the defendant, Prudence Realization Corporation, in support of said motion, and Charles H. Kriger, attorney for Joseph W. Ferris, George L. Long and Henry Leifert, as Trustees, and Delafield, Marsh, Porter & Hope by Frederic R. Rich, attorneys for the defendant, City Bank Farmers Trust Company, and Martin S. Lindgrove, as Trustees, in opposition to said motion, and in support of the judgment [fol. 11] for plaintiffs in Action #1, and due deliberation having been had thereon, and the court having filed its opinion in writing, it is

Ordered that said motion be, and the same hereby is, in all respects denied.

Enter,

C. B. McL., J. S. C.

Filed Nov. 18, 1942,
New York County Clerk's office.

In Supreme Court of New York, County of New York

[Same Title.]

Notice of Motion for Summary Judgment

Sirs:

Please take notice that upon the complaints and the answers herein and the annexed affidavits of William T. Cowin, duly sworn to the 5th day of June, 1942, and Irving L. Schanzer, duly sworn to the 5th day of June, 1942, and the exhibits thereto attached, the undersigned will move this Court at Additional Special Term to be held at the County Court House, Pearl and Centre Streets, Borough of Manhattan, City of New York, on the 17th day of June, 1942, at the opening of court on that day or as soon thereafter as counsel can be heard, for an order, under [fol. 12] Rule 113 of the Rules of Civil Practice, dismissing the complaints herein, striking out the answers of City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees under the Last Will and Testament of Herman Stutzer, deceased, and of Realty Associates Securities Corporation, and directing that judgment be entered herein in favor of the defendant Prudence Realization Corporation as prayed for in the answers interposed herein by said defendant Prudence Realization Corporation, and for such other and further relief as to the Court may seem just and proper.

Demand is hereby made that the plaintiffs and defendants serve answering affidavits five days before the return date of this motion.

Dated: New York, N. Y., June 5, 1942.

Yours, etc., Irving L. Schanzer, Attorney for Defendant Prudence Realization Corporation, Office & P. O. Address, 40 Exchange Place, Borough of Manhattan, City of New York.

To Charles H. Kriger, Esq., Attorney for Plaintiffs, Joseph W. Ferris, et al., 66 Court Street, Brooklyn, N. Y.

[fol. 13] Albert Fribourg, Esq., Attorney for Plaintiffs, Solomon Zauderer, et al., 265 East 42nd Street, New York, N. Y.

Delafield, Marsh, Porter & Hope, Esqs., Attorneys for Defendants, City Bank Farmers Trust Com-

pany and Martin S. Lindgrove as Trustees, etc., and Realty Associates Securities Corporation, 20 Exchange Place, New York, N. Y.

IN SUPREME COURT OF NEW YORK, COUNTY OF NEW YORK

[Same Titles]

AFFIDAVIT OF WILLIAM T. COWIN, READ IN SUPPORT OF MOTION

STATE OF NEW YORK,
County of New York, ss:

WILLIAM T. COWIN, being duly sworn, deposes and says:

Deponent is President of Prudence Realization Corporation, one of the defendants in the above entitled actions. Deponent is also the sole remaining Trustee of the Prudence Company, Inc., Debtor, in reorganization under Section [fol. 14] 77B of the Bankruptcy Act, presently pending before Hon. Grover M. Moscowitz, United States District Judge for the Eastern District of New York. The facts set forth in this affidavit are either based upon deponent's own knowledge or as indicated are based upon entries made in the regular course of business in the books and records of The Prudence Company, Inc., the Trustees of The Prudence Company, Inc., Debtor, and Prudence Realization Corporation.

The summonses and complaints in two actions designated as #1 and #2 were served upon defendant Prudence Realization Corporation on February 26, 1941, respectively. On April 14, 1941, the answer of City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees under the Last Will and Testament of Herman Stutzer, deceased, defendants in action #1, was served upon defendant Prudence Realization Corporation. By order dated September 3, 1941, duly made and entered herein by Hon. Peter Schmuck, Justice of this court, the said two actions were consolidated. Thereafter, by order dated September 29, 1941, duly made and entered herein by Hon. Peter Schmuck, Justice of this court, Realty Associates Securities Corporation was allowed to intervene in action #1 as a defendant and to file an answer to the complaint in said action. Pursuant to such order, an answer was interposed in said action by said Realty Associates Securities Corporation and a copy thereof

was served upon defendant Prudence Realization Corporation on October 8, 1941. Each of said answers sought affirmative relief against defendant Prudence Realization [fol. 15] Corporation. The answers of defendant Prudence Realization Corporation,

(1) to the complaint in action #1 was served upon the plaintiffs therein on November 25, 1941;

(2) to the complaint in action #2 was served upon the plaintiffs therein on November 25, 1941;

(3) to the answer of City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees under the Last Will and Testament of Herman Stutzer, deceased, was served upon said defendants on November 26, 1941; and

(4) to the answer of Realty Associates Securities Corporation was served upon said defendant on November 26, 1941.

The actions as consolidated have been noticed for trial at Additional Special Term of this court and the calendar number is 7907.

The issue presented by the pleadings is whether certificates of participation, held and owned by Prudence Realization Corporation, in the mortgage on premises #307 West 36th Street, New York City, commonly known as the Burnside First Mortgage Participation Certificate Issue, are entitled to participate in distributions of interest and principal on a parity with all other certificate holders, or whether the certificates owned by Prudence Realization Corporation shall be subordinated as to time of payment to all other holders of similar certificates.

[fol. 16] The plaintiffs in action #1 are Trustees under a Declaration of Trust entered into and executed pursuant to a Plan of Reorganization for the Burnside Certificate Issue which was confirmed and consummated in the United States District Court for the Eastern District of New York, in proceedings entitled: "In the Matter of Amalgamated Properties, Inc. In the Matter of a Plan of Reorganization of the Debtor in respect of 307 West 36th Street (Burnside) First Mortgage Participation Certificates. In Proceedings for the Reorganization of a Corporation under Section 77B of the Bankruptcy Act. No. 34791."

The plaintiffs in action #1 allege that the certificates held by Prudence Realization Corporation are subordinate to

the remaining certificates. The prayer for relief, however, seeks a judgment declaring the rights and interests of Prudence Realization Corporation and all other certificate holders, and for instructions to be given to the plaintiffs as to the distribution of the funds now held by them and to be received by them as Trustees of the Burnside Certificate Issue. The prayer for relief also includes a direction that Prudence Realization Corporation be required to account for and turn over to the plaintiffs the sums of money distributed to or held by The Prudence Company, Inc. and or Prudence Realization Corporation on account of certificates set forth in the complaint.

The answers interposed in said action #1 by City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees as above set forth and by Realty Associates Securities Corporation as certificate holders, seek affirmative relief against defendant Prudence Realization Corpora- [fol. 17] tion and also include an affirmative allegation that the certificates held by Prudence Realization Corporation are subordinate to those held by other certificate holders. Such answers seek a judgment herein determining that such certificates of participation held by Prudence Realization Corporation are subordinate to those held by the remaining certificate holders. Plaintiffs in action #2 are certificate holders in the Burnside Certificate Issue and pray for a declaratory judgment determining the rights of Prudence Realization Corporation and other certificate holders.

The answers interposed by Prudence Realization Corporation affirmatively allege that the certificates of participation held by Prudence Realization Corporation are entitled to parity of distribution with the other certificate holders, that in view of the reorganization of The Prudence Company, Inc., predecessor of Prudence Realization Corporation, and of Amalgamated Properties, Inc., both pursuant to Section 77B of the Bankruptcy Act, the question as to parity of distribution was one of federal law; that under said Federal Bankruptcy Act and the decisions thereunder, the said certificates presently held by Prudence Realization Corporation are entitled to parity of distribution with the remaining certificate holders; and further, that without regard to the applicability of the federal law, under the decisions of the courts of the State of New York the certifi-

cates held by Prudence Realization Corporation are entitled to parity of distribution.

Since the institution of this litigation, a decision has been handed down by the United States Supreme Court [fol. 18] in *Prudence Realization Corporation* v. *Geist*, 62 Sup. Ct. 978, determining the rights as between Prudence Realization Corporation and other certificate holders in the certificate issue known as Zo-Gale, which involved and decided the identical question of parity as is involved in the instant case, and in which it was determined that the question is one of federal law as to which federal decisions are controlling, and that under such federal law, the certificates of participation held by Prudence Realization Corporation are entitled to parity of distribution with all other certificate holders. This decision finally determines all the issues presented by this litigation in favor of Prudence Realization Corporation.

Since the questions raised in this litigation do not involve issues of fact but only questions of law, deponent makes this affidavit in support of a motion by defendant Prudence Realization Corporation for summary judgment, so that the issues may be disposed of without unnecessary delay. Deponent hereinafter sets forth all of the relevant facts in order to enable this court to dispose of such issues summarily without the necessity of an extended trial which can serve no useful purpose but will only increase the expense of litigation to certificate holders without variation of the result already reached by the United States Supreme Court.

The Burnside Certificate Issue was one of 54 similar certificate issues created by The Prudence Company, Inc. for the purpose of making available for sale to the general public guaranteed mortgage securities. It was created in the following manner:

[fol. 19] On or about the 20th day of June, 1927, The Prudence Company, Inc. with its own corporate funds made a loan of $1,200,000. and received in exchange therefor a certain bond and mortgage covering premises 307-13 West 36th Street, Borough of Manhattan, City of New York, made by Burnside Improvement Co. Inc., bearing date the 19th day of November, 1925, for the sum of $1,200,000., recorded in the office of the Register of the County

of New York on the 20th day of November, 1925, in Liber 3624 of Mortgages, Page 431, Section 3, Block 760.

For the purpose of issuing mortgage participation certificates in the aforesaid bond and mortgage in the name of Prudence-Bonds Corporation, a domestic corporation, and so that such certificates could be sold with the guaranty by The Prudence Company, Inc., the bond and mortgage were assigned by The Prudence Company, Inc. to Prudence-Bonds Corporation. The latter corporation entered into a deposit agreement with The Bank of America, bearing date the 25th day of June, 1927, pursuant to the terms of which the bond and mortgage were assigned to The Bank of America. Prudence-Bonds Corporation was authorized to issue mortgage participation certificates in the said bond and mortgage and The Prudence Company, Inc. was to guarantee the payment of the principal and interest of such mortgage participation certificates so issued. A copy of said deposit agreement and said mortgage participation certificates are hereto annexed, marked respectively Exhibit "A" and Exhibit "B", and made part hereof.

[fol. 26] The assignment of the bond and mortgage by The Prudence Company, Inc. to Prudence-Bonds Corporation was dated the 3rd day of August, 1927, and was recorded in the office of the Register of the County of New York on the 9th day of August, 1927, in Liber 3814, Page 172.

Pursuant to the terms of said deposit agreement, The Prudence Company, Inc. executed, acknowledged and delivered to The Bank of America an instrument in writing bearing date the 3rd day of August, 1927, guaranteeing to each and every holder of certificates of participation issued by Prudence-Bonds Corporation in and to the bond and mortgage heretofore described, the payment of interest when due according to the terms of each certificate so issued and the payment of principal and every instalment thereof when due or within eighteen months thereafter according to the terms of said guaranty. The said agreement appointed The Prudence Company, Inc. the irrevocable agent for the collection of principal and interest on the said bond and mortgage. A copy of said guaranty agreement is hereto annexed, marked Exhibit "C" and made a part hereof.

Thereafter certificate of participation in the aforesaid bond and mortgage were sold to various persons to the full extent of the aforesaid mortgage, to wit, the sum of $1,200,000. By payments made by the mortgagor, the said

mortgage was thereafter reduced to the sum of $1,016,000, and $84,000 of certificates were paid and retired.

By deed dated June 13, 1932, the mortgaged premises underlying the Burnside Certificate Issue were conveyed to Amalgamated Properties, Inc. subject to the continuing lien of the said mortgage.

[fol. 21] The Prudence Company, Inc. fulfilled all of its obligations under its guaranty to pay interest until July 1, 1933, when, pursuant to regulations of the Banking Board of the State of New York, The Prudence Company, Inc. was restricted from making any payments to fulfill its guaranty obligations out of its corporate funds, and was further restricted and limited in making distributions to certificate holders to the extent only to which the property or the mortgagor made moneys available for distribution for interest or on account of principal.

On February 1, 1935, petitions for the reorganization of The Prudence Company, Inc., Debtor, under Section 77B of the National Bankruptcy Act were approved by the United States District Court for the Eastern District of New York, and Stephen Callaghan, John M. McGrath and William T. Cowin were duly appointed and qualified as Trustees of the Debtor. By orders duly made and entered in said proceedings on May 18, 1938 and February 6, 1939, the resignations of Stephen Callaghan and John M. McGrath as such Trustees were duly accepted by the United States District Court and William T. Cowin has continued as the sole remaining Trustee of the said debtor corporation. The said proceedings for the reorganization of the said The Prudence Company, Inc., Debtor, are entitled: "In the Matter of The Prudence Company, Inc., Debtor. In consolidated proceedings for reorganization under Section 77B of the Bankruptcy Act. Nos. 27496 and 27028."

Thereafter on March 16, 1936, a petition for the reorganization of Amalgamated Properties, Inc., at that time a wholly-owned subsidiary of The Prudence Company, Inc., [fol. 22] Debtor, was approved by the United States District Court for the Eastern District of New York in proceedings entitled: "In the Matter of Amalgamated Properties, Inc., Debtor. In proceedings for the reorganization of a corporation under Section 77B of the Bankruptcy Act. No. 34791." Pursuant to order duly made and entered herein dated March 16, 1936, said Amalgamated Proper-

ties, Inc., Debtor, was continued in possession of its assets. In the said proceedings for the reorganization of Amalgamated Properties, Inc., a plan of reorganization for the Burnside Certificate Issue was promulgated by the said Debtor and thereafter the said plan as amended was duly confirmed by order of the said United States District Court for the Eastern District of New York dated June 14, 1938, and was thereafter consummated pursuant to further order of said court dated November 1, 1938. Pursuant to the said amended plan of reorganization, the plaintiffs in action #1 were appointed trustees for the benefit of all mortgage participation certificate holders in said mortgage and have duly qualified as such trustees and have executed and acknowledged the Declaration of Trust required by the plan of reorganization and the orders of the federal court.

The said The Prudence Company, Inc., as part of its regular business, bought and sold Prudence-Bonds Corporation bonds and mortgage participation certificates before or after maturity; that before the sale and after the repurchase of such bonds and certificates, they were included in the balance sheets and published financial statements of The Prudence Company, Inc. as assets, as appears from The Prudence Company, Inc. books and records.

[fol. 23] The guaranty of The Prudence Company, Inc. was to make payment of principal of such certificates when due or within eighteen months thereafter. With respect to mortgages, Prudence-Bonds Corporation bonds and mortgage participation certificates, including the Burnside Certificate Issue participation certificates involved in this litigation maturing January 1, 1932 and thereafter, The Prudence Company, Inc. availed itself of the right reserved in its guaranty as above set forth to delay the payment of principal for eighteen months after maturity, meanwhile continuing the payment of interest thereon.

The Prudence Company, Inc. acquired for its own account and retained certain of the mortgage participation certificates in the Burnside Certificate Issue in the total amount of $431,212.86. The details of the acquisition of said certificates are set forth in the schedule hereto annexed marked Exhibit "D" and made part hereof. The information contained in said schedule was secured from entries made in the regular course of business in the books and records of The Prudence Company, Inc. As appears on page 5 of said Exhibit "D," the Prudence Company,

Inc. acquired $15,600. face amount of certificates of the Burnside Certificate Issue through the so-called Pender-Buckbee-Merriam account. The books and records of The Prudence Company, Inc. disclose that this account was used by The Prudence Company, Inc. to acquire mortgage participation certificates, bonds and other securities of The Prudence Company, Inc. in the open market at prices substantially less than the par value thereof.

[fol. 24] In the course of the proceedings for the reorganization of the Burnside Certificate Issue, the question arose as to whether such certificates of participation in said issue held by the Trustees of The Prudence Company, Inc., Debtor, were entitled to share on a parity with those held by other certificate holders. For the purpose of expediting the consummation of the plan and eliminating the necessity for extended litigation in order to determine the legal rights affecting such certificates, the plan of reorganization directed its consummation, providing, however, that anything in the plan to the contrary notwithstanding, no distributions shall be made on the certificates held by The Prudence Company, Inc., Debtor, Trustees, unless and until it shall have been adjudicated by a court of competent jurisdiction that such certificates held by the Prudence Trustees or their successors are entitled to share on a parity with the general public or whether they should be subordinated.

In 1938 The Prudence Company, Inc., Debtor, was found to be insolvent and thereafter a plan of reorganization for said debtor corporation was proposed by Reconstruction Finance Corporation, its largest individual creditor, which plan as amended was confirmed by order of the United States District Court for the Eastern District of New York on May 26, 1939, and was consummated pursuant to said order on June 1, 1939. The said plan of reorganization provides for the transfer of all of the assets of the debtor estate to the defendant Prudence Realization Corporation, a new company organized pursuant to the provisions of said plan. The assets so received by Prudence Realization [fol. 25] Corporation are to be liquidated solely for the benefit of the creditors of The Prudence Company, Inc., a determination having been made by the federal bankruptcy court that the stockholders of The Prudence Company, Inc., Debtor, have no interest in the bankrupt estate and are not entitled to share in the distribution of the proceeds of its liquidation. A copy of said plan of reorgan-

ization and the order confirming it are hereto annexed, marked Exhibit "E" and made part hereof.

Deponent is advised by counsel and verily believes that the decision of the United States Supreme Court in *Prudence Realization Corporation* v. *Geist*, 62 S. Ct. 978 (1942), referred to above, concludes the legal issues involved here. In that case, upon consideration of the fact of reorganization of the certificate issue in the federal bankruptcy court, under Section 77B of the Bankruptcy Act, and the insolvency of The Prudence Company, Inc., Debtor, and its reorganization under the same statute in the same court, the United States Supreme Court held that certificates of participation held by Prudence Realization Corporation, and acquired by it in the same manner as were those involved in the instant litigation, were entitled to parity of distribution with all other certificates. That Court further held that the question involved was one of bankruptcy distribution, which was a federal question upon which the federal decisions were controlling. In the opinion of deponent and of counsel for Prudence Realization Corporation, that decision is determinative of the issues involved in the instant litigation, and under the applicable law of the State of New York, is to be applied in this case.

[fol. 26] Moreover, as appears on the face of the certificate of participation itself (Exhibit "B" hereto annexed), that instrument provides that,

> "The share or part in said bond, mortgage and extension agreement represented by this Certificate, is not and shall not be subordinate to any other share or shares thereof, and is not and shall not be subject to any prior interest therein."

In addition to such provision, the following is also set forth on the face of the certificate:

> "4. The Corporation (Prudence-Bonds Corporation), The Guarantor (The Prudence Company, Inc.), and The Bank of America, New York, (the depositary) for their respective corporate accounts, may be the holder or pledgee of similar shares in said bond and mortgage, as extended." (Parentheses supplied.)

By the agreement between the parties independently of the question of federal law, The Prudence Company, Inc.

was authorized to hold such certificates on a parity with other certificate holders.

Wherefore, your deponent prays that an order be entered herein dismissing the complaints in actions Nos. 1 and 2 herein, striking out the answers of City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees under the Last Will and Testament of Herman Statzer, deceased, and of Realty Associates Securities Corporation, and directing the entry of judgment herein in favor of defendant Prudence Realization Corporation, decreeing,

[fol. 27] (1) that Prudence Realization Corporation, as holder of certificates of participation in the mortgage described in the complaint, is entitled to receive from the plaintiffs herein the principal amounts and interest due on the said certificates on a parity with other certificate holders;

(2) that the plaintiffs herein distribute the said funds in their possession and which shall hereafter come into their possession accordingly;

(3) that the sum received by Prudence Realization Corporation from the Trustee of The Prudence Company, Inc., representing interest distributions on certificates of participation in the 307 West 36th Street (Burnside) Certificate Issue received by the Prudence Trustees after February 1, 1935, constitutes a corporate asset of Prudence Realization Corporation;

all as prayed for in the answers interposed herein by said defendant Prudence Realization Corporation.

William T. Cowin.

(Sworn to June 5, 1942.)

[fol. 28] Exhibit "A" Annexed to Affidavit of William T. Cowin

Agreement, made as of the 25th day of June, 1927, between Prudence Bonds Corporation, a corporation duly organized and existing under the laws of the State of New York (hereinafter sometimes called "the Corporation"), and The Bank of America, a like corporation having its principal place of business at No. 44 Wall Street, in the

Borough of Manhattan, City and State of New York (hereinafter sometimes called "the Depositary").

Whereas, the Corporation is the owner of a certain Bond in the principal amount of (or Bonds in the aggregate principal amount of) One Million Two Hundred Thousand Dollars secured by a first Mortgage or by first Mortgages covering the land and buildings situated on the N/S of West 36th Street, running through to West 37th Street, 104.4¾ feet west of 8th Avenue, in the Borough of Manhattan, City and State of New York, said mortgage or mortgages being duly recorded in the office of the Register of the County of New York in Liber 3624 of Mortgages page 431 and payment thereof extended by agreement dated June 20th, 1927, between The Prudence Company, Inc. and Burnside Improvement Co., Inc., and recorded in said Register's Office in Liber —— Page —— and upon which bond and mortgage as extended there remains unpaid the principal sum of One Million One Hundred Thousand Dollars, which bond and mortgage and/or bonds and mortgages (if more than one) and consolidation, spreading and/or any other agreement or agreements if any, relating to said Bond and Mortgage [fol. 29] or Bonds and Mortgages, are herinafter referred to as the "Bond and Mortgage"; and

Whereas, the Corporation desires to sell and assign undivided shares or parts of the Bond and Mortgage and the debt secured thereby, and to issue certificates evidencing ownership of such undivided shares or parts therein, and to guarantee the payment of principal and interest of such undivided shares or parts, such certificates to be certified by the Depositary, the registered certificate, guarantees, depositary's certificate and form of interest order attached to bearer certificates, relating to such shares or parts to be in substantially the form set forth in Schedule A attached hereto and made a part of this agreement.

Now, in consideration of the premises and of the mutual agreements herein contained, and to define the rights and duties of the parties and in order to secure to the holders of said certificates the ownership of parts or shares in said Bond and Mortgage, This Agreement, Witnesseth:

1. The Corporation has executed and simultaneously with the execution and delivery of this agreement has delivered to the Depositary an assignment of said Bond and Mortgage and has likewise delivered title and fire insurance pol-

icies relating thereto, made payable to, or properly endorsed for the benefit of, (as the case may be) the Depositary.

[fol. 30] II. The Corporation hereby reserves the right, and such right is hereby granted to it by the Depositary, to issue certificates substantially in the form set forth in Schedule A attached hereto; each certificate so issued, when certified by the Depositary, shall vest in the holder thereof, an undivided share or part to the extent of the principal amount therein stated in the aggregate principal of said Bond and Mortgage, and interest on the principal amount of said certificate at the rate provided in said certificate, out of the interest to fall due on said Bond and Mortgage. Such certificates shall be of the denominations as may from time to time be determined by the Corporation in writing on any order for the certification thereof.

III. The Bond and Mortgage, an appraisal showing the value of the real property covered by said mortgage to be at least fifty per centum more than the amount of said mortgage, the guarantee of The Prudence Company, Inc., guaranteeing to the holders of the certificates payment of principal and interest, and the insurance policies and other instruments and evidences of title relating thereto are and shall continue to be held by The Bank of America as Depositary for the benefit of all parties interested in said Bond and Mortgage, according as their interest may appear, it being understood and agreed between the parties hereto and by and with the persons who will from time to time be the holders of said certificates, that each certificates shall represent and be an evidence of the ownership of an undivided share or part to the extent of the principal [fol. 31] amount therein stated, in the aggregate principal of said Bond and Mortgage and the mortgage debt secured thereby (with interest at the rate specified in said certificate) and that each holder is entitled to a like proportion, right or benefit in said guarantees of payment, policy or policies of title insurance, insurance policies and other instruments and evidences of title relating thereto, accompanying the same, or which may at any time accompany or be collateral thereto, and held by the Depositary, each such share or part being owned by the holder thereof without priority of any share or part over any other, whether held by the Corporation or Depositary or by the holder of

any other certificate to be issued hereunder, and each share or part not being subordinate to any other shares thereof and not subject to any prior interest in said bond and mortgage.

IV. The Corporation covenants that there is now unpaid upon the Bond and Mortgage the sum of One Million One Hundred Thousand Dollars with accrued interest thereon, and that the aggregate principal amount of all certificates to be issued and outstanding hereunder and certified by the Depositary shall not at any time exceed the amount of principal of the Bond and Mortgage at the time unpaid, and that no certificate shall be valid until certified by the signature of an officer of the Depositary to the certification endorsed thereon.

V. Each of said certificates shall be payable only upon presentation and surrender thereof, except as hereinafter provided in the case of a certificate mutilated, lost, de- [fol. 32] stroyed or stolen. In case any certificate issued hereunder, prior to the time of payment thereof, shall become lost, mutilated, destroyed or stolen, the Corporation in its discretion may execute and thereupon the Depositary in its discretion may certify and deliver in exchange for and upon cancellation of the mutilated certificate, or in substitution for the certificate so lost, destroyed or stolen, a new certificate of like tenor and date, but bearing a different number. The applicant for such substituted certificate shall furnish to the Corporation evidence satisfactory to it of such loss, destruction or theft and shall also furnish, if required, indemnity satisfactory to the Corporation, The Prudence Company, Inc., and the Depositary.

VI. Whenever the Corporation shall be the holder of all of the certificates which may have been issued pursuant to this agreement and which are then outstanding and unpaid, it may surrender the same to the Depositary for cancellation, and terminate this agreement, and thereupon the Depositary shall at the expense of the Corporation, assign the Bond and Mortgage to the Corporation and deliver to the Corporation the Bond and Mortgage and all other instruments in respect thereto then held by the Depositary.

If the corporation shall give notice of intention to redeem all outstanding certificates and shall pay to the Depositary the principal amount of such outstanding certifi-

cates, together with interest thereon to the date fixed for redemption at the rate specified in the certificates, and shall pay to the Depositary the estimated cost of the publication of the notice of redemption, the Depositary shall, at the [fol. 33] expense of the Corporation, assign the Bond and Mortgage to the Corporation and deliver to the Corporation the Bond and Mortgage and all other instruments in respect thereto then held by the Depositary.

VII. The Corporation expressly reserves to itself on any interest day by giving not less than thirty (30) days' notice in the manner herein provided, the right to redeem before maturity any or all of such certificates outstanding by payment of the face principal amount thereof, together with all interest accrued thereon to the date of redemption. The Corporation shall determine which certificates shall be so redeemed and discharged.

Notice of the intention of the Corporation so to redeem any of said certificates shall be given by publication thereof by the Corporation once a week for four successive weeks in one daily newspaper of general circulation, published in the City of New York. Such notice shall state the number of the certificates so to be redeemed and the place and time for their presentation and surrender, which time shall not be less than thirty (30) days or more than fifty (50) days from the date of the beginning of the publication and shall also state that the interest upon the certificates so to be redeemed will cease upon the date fixed for redemption. A copy of said notice of redemption shall also be mailed by the corporation at least thirty (30) days and not more than fifty (50) days before such redemption date to the holders of registered certificates which are to be redeemed, at their last addresses appearing upon the registry books [fol. 34] kept at the office of the Corporation. Not less than four days before the redemption date specified in such notice, the Corporation will deliver to the Depositary affidavits of such publication and mailing.

Not later than sixty (60) days after the redemption date the Corporation will:

(1) deposit with the Depositary all certificates so called for redemption which it shall have actually redeemed and paid, and will also

(2) deposit with the Depositary in cash an amount sufficient to redeem all certificates so called for redemp-

tion as shall not then have actually been redeemed and paid, in a special account to be known as "Prudence-Certificates Redemption Account." Thereafter, upon presentation to the Depositary of certificates so called for redemption, the Depositary shall redeem and pay the same from the Prudence-Certificates Redemption Account, or if presented for cancellation by the Corporation the Depositary shall pay to the Corporation the full amount applicable to the redemption of each such certificate so presented.

After the date set for redemption, such notice of intention to redeem having been given by publication and mailing, such certificates so called for redemption shall cease to draw interest unless the Corporation shall fail to make payment of any such certificate when properly presented or shall fail to deposit such cash with the Depositary.

If the Corporation shall give such notice with respect to all of the certificates then outstanding and shall make the payments herein provided for the Depositary shall, at [fol. 35] the expense of the Corporation assign the Bond and Mortgage to the Corporation and deliver to the Corporation said Bond and Mortgage and all other instruments in respect thereto then held by the Depositary.

VIII. In the event that the Bond and Mortgage shall, because of any default in any of the provisions thereof, become due and be paid prior to the maturity of said certificates, the Depositary shall, upon receiving the full amount of principal and interest due thereon, satisfy the Mortgage and shall pay said amount ratably to the holders of said certificates. If the amount so received by the Depositary shall not be sufficient to pay the principal of said certificates and interest at the rate therein specified up to the date of payment, the said Depositary shall pay the amount so received to the holders of said certificates ratably in proportion to the amount due them, without preference of principal over interest or interest over principal.

IX. The provisions of the certificates are hereby made part of this agreement, so far as the provisions therein contained are enforceable by any of the parties hereto, either for themselves or on behalf of the holders of any certificates issued hereunder, and the holders of such certificates by the acceptance of the same consent to the terms of

this agreement and agree that the Bond and Mortgage shall be held pursuant to the terms hereof.

[fol. 36] X. The certificates to be issued hereunder shall be certified by the Depositary and delivered to the Corporation, or upon its order, upon a written order of any officer of the Corporation directing such certification and delivery.

XI. The Corporation shall not assign any interest in the Bond and Mortgage while the same is held by the Depositary hereunder, except by certificates issued as herein provided and certified by the Depositary.

XII. The Depositary will at all times, upon request, keep the Corporation advised of any payments that have been made to it on account of principal or interest upon the Bond and Mortgage and of any payments made by the Depositary to the holders of any said certificates on account of either principal or interest.

XIII. All of the obligations of the Depositary to the holders of the certificates shall be limited to those defined and stated in said certificates so authenticated by it and in this agreement.

Nothing herein or in said certificates contained shall be taken as a promise or obligation of the Depositary to pay the principal of or interest upon the certificates, except out of such moneys applicable thereto as may be received by the Depositary or be collected by it on the Bond and Mortgage.

It shall be no part of the duty of the Depositary to effect or collect insurance against fire or other damage to the mortgaged premises or any part thereof, or to renew any policies of insurance or to inquire or keep informed as to [fol. 37] the performance or observance of any covenant or agreement on the part of the mortgagor in the Mortgage or to pay any taxes, assessments or other charges upon the mortgaged premises or to do any other thing not affirmatively or expressly agreed to be done by it hereunder, nor shall it be liable for the responsibility of insurers.

The Depositary shall not be under obligation or duty to institute or defend any suit or proceeding brought against it by reason of any matter or thing hereunder or take any action in respect of any default hereunder or otherwise, or towards the execution or enforcement of any trust

hereby created unless requested in writing as herein provided and security of a character and amount satisfactory to it is deposited with the Depositary as indemnity against all loss, costs, damages and expenses which might result therefrom or be occasioned thereby.

The Depositary shall not become liable or responsible for any destruction, loss, injury or damage which may be done or happen to the mortgaged property by any person whatsoever or by or from any cause whatsoever.

The Depositary shall not be liable for any error of judgment or for anything done or omitted by it in the exercise of its discretion hereunder, but it may in its discretion advise with legal counsel, and everything done or suffered in good faith by the Depositary in accordance with the opinion of counsel shall be conclusive in favor of the Depositary. The Depositary shall incur no liability to anyone in acting upon any notice, request, order, consent, certificate, statement, note, bond, document or other paper believed by it to be genuine and to have been signed by the proper person.

[fol. 38] It is expressly declared to be a condition upon which the Depositary assents to these presents that it shall not in any manner be held responsible for any representation as to the value of the property covered by said bond and mortgage, the title thereto, the validity or priority of the Bond and Mortgage, or as to whether such certificates are legal investments for fiduciaries in any State, or of any other statement herein made, neither the Depositary nor its successors purporting to have any knowledge in respect of any such matter.

XIV. To the extent not provided to be paid to the Depositary in and by any judgment of final order, and paid pursuant thereto to the Depositary, the Corporation will pay all expenses, which may be incurred by the Depositary, including reasonable compensation of its counsel, in enforcing the terms of the Bond and Mortgage or in defending or protecting the lien of said mortgage, or incurred in any action or proceeding to which action or proceeding the Depositary is made a party, or in performing its duties hereunder, all of which shall be paid by the Corporation and until paid shall be a lien on any interest of the Corporation in the Bond and Mortgage.

XV. All recitals, statements of facts and representations herein contained, shall be taken as statements of the Corporation and shall not be construed as made by the Depositary.

XVI. The Depositary or any successor Depositary may resign and be discharged under this agreement, by written notice of such resignation sent by registered mail to the [fol. 39] Corporation; such resignation shall take effect thirty days after the mailing of such notice. In case at any time any Depositary or successor hereunder shall resign, be removed, or otherwise become incapable of acting, then a successor or successors may be appointed by the Corporation, if still in existence and not under the control of any receiver or trustee in bankruptcy; or if not in existence or if under the control of a receiver or trustee in bankruptcy, then by the holders of a majority in amount of the certificates then outstanding. Such appointment shall be in writing executed by the Corporation or by such holders, as the case may be.

Any such new Depositary shall always be a Trust Company, a Bank authorized to conduct a trust department or Title Guaranty Corporation organized under the laws of the State of New York, or a National Bank located in the State of New York and duly authorized to act as a trustee therein, and having a paid up capital and surplus aggregating at least One Million Dollars, and shall accept the appointment as such by an instrument in writing, duly acknowledged, in which it shall agree to be bound by the provisions of this instrument, and upon service of said acceptance upon the Depositary so to be succeeded, the latter, upon payment of its fees and expenses to date, shall execute and deliver to such new Depositary an assignment or assignments, executed so as to entitle them to be recorded, of the Bond and Mortgage then held by it hereunder, and shall deliver to said new Depositary such Bond and Mortgage and all title and fire insurance policies and other instruments or papers pertaining thereto.

[fol. 40] Any Trust Company or Bank into which the Depositary or any successor to it may be merged or converted, or with which the Depositary or any successor to it may be consolidated, or any Trust Company or Bank resulting from any merger, conversion or consolidation to which the Depositary or any successor to it shall be a

party shall, unless incapable of acting as Depositary hereunder, thereupon be deemed to be the Depositary hereunder and without any further act, deed, conveyance or transfer, shall become vested with all of the rights, powers, duties and obligations of the Depositary so merged, converted or consolidated, with like effect as if originally named as Depositary hereunder.

XVII. The Depositary shall have the sole right to take any action deemed proper to protect the mortgage security, to enforce in whole or in part, by foreclosure or otherwise, any of the provisions of the Bond and Mortgage, in the name of itself or of the holders of said certificates, to collect and in its own name sue for and receive the principal and interest secured to be paid by the Bond and Mortgage or any part thereof, and to satisfy and discharge or assign the Bond and Mortgage in its own name on receiving full payment therefor; to collect, sue for and receive and settle or compromise fire insurance, in case of loss by fire, and to exercise every right, option or privilege in the Bond and Mortgage contained, and any agreements relating thereto, give to the mortgagee, but shall not be required so to do, except as may be required pursuant to Article XIX hereof.

In the event of any loss occurring under any of said policies of insurance, any amount received by the Deposi- [fol. 41] tary as a result thereof shall be held by it for the benefit of said certificate holders and at the option of the Corporation, to be exercised in writing, shall be applied toward the repair or reconstruction of any damaged or destroyed building on the premises and or to the payment of any or all of said certificates in accordance with the terms hereof. Payments toward the cost of such repair or reconstruction shall be upon the certificate or certificates of the Corporation and any such certificate shall be full protection to the Depositary.

XVIII. The Depositary shall pay to the holders of said certificates interest thereon at the rate in said certificates provided, but only out of moneys received by or paid to it for such account. Any excess of interest collected on the Bond and Mortgage over and above the above rate specified in the certificates shall belong to and be paid to the Corporation.

Any moneys that may be paid to the Depositary by the Corporation for the purpose of making payment of any amount as to which there is a default under the Bond and Mortgage, shall be repaid to the Corporation by the Depositary out of any moneys received by it applicable to the payment of such amounts, if, as and when received by the Depositary.

XIX. Whenever, under the terms of the Bond and Mortgage, the mortgagee shall have the right to take any action or proceeding for the enforcement of any right or rights thereunder, the Depositary, Corporation and/or said The Prudence Company, Inc., may, and upon the written re- [fol. 42] quest of the Corporation, or if the certificates are in default upon the written request of the holders of not less than fifty per cent of the aggregate principal amount of such certificates then outstanding and unpaid, the Depositary shall proceed to take such action or proceeding, but only upon receiving indemnity in form and amount satisfactory to it.

XX. In case the Depositary shall take any action or proceeding for the enforcement of any right or rights hereunder or under the terms of the Bond and Mortgage, and shall receive any moneys as proceeds of any sale of the mortgaged premises, the Depositary shall apply the same as follows:

First. To the payment of the costs and expenses of such sale, including reasonable compensation to the Depositary, its agents, attorneys and counsel and all expenses, liabilities and advances whatsoever made and incurred by the Depositary under this instrument and all unpaid taxes, assessments and water rates superior to the lien of said mortgage.

Second. To the payment of the whole amount of principal and interest at the rate specified in the certificates which shall then be owing and unpaid on said certificates and every one of them, and if such proceeds are not sufficient to pay in full the amount of principal and interest owing upon said certificates, the said proceeds shall be paid ratably in proportion to the amounts owing and unpaid upon them respectively, without preference of any certificate over any [fol. 43] of the others and without preference or priority of principal over interest or interest over principal.

XXI. If the principal of the Bond and Mortgage is declared to be due and payable, and if thereafter the Bond and Mortgage be paid, interest on the certificates shall thereupon cease from the date of such payment, but the Depositary shall give notice to the holders of said certificates as provided in Article VII hereof, of the time of payment of the principal sum secured by the Bond and Mortgage. Upon payment of the Bond and Mortgage, said mortgage may be satisfied of record by the Depositary or the Corporation, or assigned by the Depositary of the Corporation without regard to whether said certificates have been presented for payment or not. If any holder shall fail to present any certificate held by him, then, upon such payment of the Bond and Mortgage the principal sum secured by such certificate, together with interest thereon to the date of such payment, at the rate aforesaid, shall be held by the Depositary as a special deposit without interest for the benefit and credit of such holder, to be paid upon the surrender of such certificate to the Depositary. If, in case of any default, the principal of the Bond and Mortgage has been declared due and payable prior to the maturity date mentioned therein and thereafter any such default be cured by payment of the amount in default and expenses of any proceeding to enforce the terms of the Bond and Mortgage or of this agreement including reasonable expenses for counsel fees be paid, the Depositary, in its discretion, may, and at the election of the Corporation shall, waive any such default.

[fol. 44] XXII. The surplus, if any, in the hands of the Depositary of any moneys received by it pursuant to the terms hereof, after paying all other moneys herein provided to be paid, shall be paid over to whomsoever may be lawfully entitled to receive the same.

XXIII. The Depositary is hereby authorized to and hereby does appoint the Corporation as its Agent to collect the interest and principal upon the Bond and Mortgage and to disburse the same whether before or after any default under said certificates or the Bond and Mortgage, and the Depositary does hereby appoint the Corporation as its Agent to collect such principal and interest and to disburse the same in the manner herein and in the certifi-

cates provided, and does hereby authorize and direct the Mortgagor and/or the owner of the premises covered by the Bond and Mortgage to make such payments of principal and interest, including any prepayments of principal or interest, directly to the Corporation until otherwise notified in writing by the Depositary. Any instalments paid by the Mortgagor and/or the owner of the premises covered by the Bond and Mortgage in reduction of the principal of the Bond and Mortgage shall be held as a sinking fund, and at the option of the Corporation when and as often as the moneys in said sinking fund amount to a sum sufficient to redeem such certificate or certificates as the Corporation may elect to redeem, such moneys shall be applied to the payment and retirement pursuant to the terms hereof and of said certificates, of one or more certificates selected by lot by the Corporation. The Depositary is authorized to [fol. 45] appoint, and does hereby appoint, the Corporation as its Agent to effect any such payment or retirement of certificates and to hold such sinking fund. The Depositary shall be under no duty or responsibility in respect to any amounts collected by the Corporation, or as to the disbursement of the same and shall not be responsible in any manner for any moneys held by the Corporation in the sinking fund or for the application of the same by the Corporation. The Depositary may, by instrument in writing addressed to the Corporation and the Mortgagor, revoke the authority hereby conferred upon the Corporation to collect interest and principal upon said bond and mortgage, and in the event of such revocation may direct the Mortgagor to make all further payments of principal or interest or any prepayments of principal or interest, to the Depositary, and in such event, the Corporation shall, at the written request of the Depositary, pay over to the Depositary all sums received by it on account of such principal and interest, and not theretofore actually disbursed by it in the payment of principal and/or interest to the certificate holders, and including any moneys held by it in any sinking fund.

XXIV. Wherever in this indenture the words "title insurance policy" or "title insurance policies" or "fire insurance policy" or "fire insurance policies" are used, they shall, unless the context shall require a different construction, be deemed to refer not only to such documents

originally deposited with the Depositary hereunder, but also to any that may be substituted therefor pursuant to the provisions hereof. Wherever in this indenture the words "Bond and Mortgage" or similar words are used, [fol. 46] they shall, unless the context shall require a different construction, be deemed to refer to any consolidated Bond and Mortgage.

XXV. Neither the Depositary, the Corporation nor The Prudence Company, Inc. shall be under any obligation to recognize any person, firm or corporation as the holder or owner of any certificate or to do or refrain from doing any act pursuant to the request of any person, firm or corporation professing to be or claiming to be such holder or owner, until such person, firm or corporation shall produce the certificate claimed to be owned by him or it, and deposit the same with the Depositary or the Corporation. All powers and rights of action under this agreement may be exercised and enforced at all times by either the Depositary or the Corporation at their and each of their election, without the possession or production of any such certificate, or proof of ownership thereof. The Depositary, the Corporation and/or The Prudence Company, Inc. may conclusively assume that any person having the physical possession of any certificate or interest order is the owner thereof and are entitled to act upon any notice, request, consent, certificate or other instrument or paper believed by them or either of them to be genuine and to be properly executed.

XXVI. The Depositary agrees to pay to the Corporation, interest on all moneys received by the Depositary for disbursement under this agreement so long as such moneys shall be with the Depositary, such interest to be at the maximum rate allowed by the Depositary on deposits and to [fol. 47] be credited monthly or at such other intervals as the Depositary credits interest on deposits received in the usual course of its business, except deposits made under Paragraph VII, Section 2.

XXVII. The provisions hereof apply to and shall bind and be for the benefit of the parties hereto and their respective successors and assigns.

In Witness Whereof, the parties hereto have hereunto caused their corporate seals to be affixed and these presents

to be signed by two of their respective officers and dated as of the day and year first above written.

Prudence-Bonds Corporation, By (Signed) Clifford S. Kelsey, Vice-President. (Seal.)

Attest:

(Signed) J. A. Mutke, Asst. Secretary. The Bank of America, by (Signed) Howard B. Smith, Trust Officer. (Seal.)

Attest:

(Signed) A. M. Massie, Asst. Cashier.

(Duly acknowledged.)

[fol. 48] EXHIBIT "B" ANNEXED TO AFFIDAVIT OF WILLIAM T. COWIN

No. 888 $

Thrift Prudence and Safe Investment Lead to Independence and Wealth

PRUDENCE-BONDS CORPORATION

hereinafter called the "Corporation", has received from

hereinafter called the "registered owner"

for the purchase of, and hereby assigns to the registered owner, an undivided share or part equal to that amount, and due on—— — 19—, with interest at the rate of five and one-half per centum per annum, payable semi-annually on the first days of January and July, from —— —, 19—, in the bond of Burnside Improvement Co., Inc., in the principal amount of $1,100,000.00 and in the mortgage securing the same, with payment extended, covering the premises situate on the northerly side of West 36th Street 104 feet 10 inches west of Eighth Avenue, in the Borough of Manhattan, County, City and State of New York.

The share or part in said bond, mortgage and extension agreement represented by this certificate, is not and shall not be subordinate to any other share or shares thereof, and is not and shall not be subject to any prior interest therein.

The bond, mortgage and extension agreement, with the guarantee of The Prudence Company, Inc., guaranteeing

the holder of this and similar certificates, payment of principal and interest; the insurance policies and other instruments and evidences of title relating thereto; and an ap- [fol. 48] praisal showing the value of the real property covered by said mortgage to be worth at least fifty per cent more than the amount of said bond and mortgage, as extended, are and shall continue to be held for the benefit of the holder of this certificate and of any other persons who may be interested in said bond, mortgage and extension agreement, by The Bank of America, New York.

All certificates evidencing ownership of a share or part in said bond, mortgage and extension agreement are issued and held pursuant to a deposit agreement dated June 25, 1927, between the Corporation and said The Bank of America, New York, and the holder of this certificate, by accepting the same agrees to all of the conditions and agreements contained in said deposit agreement and to the following further conditions.

1. The Corporation and/or The Prudence Company, Inc., hereinafter called the "Guarantor," are irrevocably authorized to collect all moneys payable under the terms of said mortgage; credit said bond, mortgage and extension agreement with payments thereon and in its own name to satisfy or assign said mortgage upon payment thereof; account to the holder of this certificate for his share of the principal and for interest at the rate of 5½% per annum thereon, payable under the terms of this certificate and to retain any balance of moneys collected; take any action it may deem necessary or proper to protect the mortgage security and in its own name to enforce in part or whole by foreclosure or otherwise, any of the provisions of said bond, mortgage, extension agreement, insurance policies or other instruments relating thereto or to the mortgaged premises.

[fol. 50] 2. The Corporation upon the consent of the Guarantor, may at any time waive or modify any condition or provision contained in said bond, mortgage and extension agreement, and extend or waive the payment of any instalment of principal under the terms of said bond, mortgage and extension agreement, provided that the Guarantor shall not be released in any event from paying this certificate in accordance with the terms thereof.

3. The Corporation may pay this certificate at or after its maturity, without notice, and if payment or offer of payment is made at or after maturity, interest shall cease to run from the time of such payment or offer of payment; or the Corporation may redeem this certificate at any time prior to maturity upon thirty days' notice in writing to the registered owner, and interest shall cease to run from the time fixed for redemption in such notice. Either at or after such maturity, or such date fixed for redemption, the Corporation may deposit the moneys due under this certificate with The Bank of America, New York, for the account of the holder, and the Corporation and the Guarantor will thereupon be released and discharged from any further liability under this certificate.

4. The Corporation, The Guarantor and The Bank of America, New York, for their respective corporate accounts, may be the holder or pledgee of similar shares in said bond and mortgage, as extended.

[fol. 51] 5. This certificate shall not be valid unless certified by said The Bank of America, New York.

In Witness Whereof, Prudence-Bonds Corporation has caused this instrument to be signed by its proper officers and its corporate seal to be hereunto affixed on the — day of ——, 19—.

Prudence-Bonds Corporation, —— —, ——, Vice-President. —— —, ——, Assistant Secretary.

While the bond secured by the mortgage mentioned in this certificate is payable by its terms on the dates mentioned in said extension agreement, the policy of The Prudence Company, Inc., entitles it at its option to a period of eighteen months thereafter in which to collect the principal. Regular payment of interest meanwhile at the above rate is guaranteed. The interest paid on this certificate is subject to a Federal income tax, and in the hands of residents of the State of New York, to the State income tax.

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(On reverse side thereof)

The Prudence Company, Inc., hereby certifies to the holder of the within certificate, that by the guarantee therein

mentioned and now in the possession of the depositary named in the Deposit Agreement referred to in said certificate, it has guaranteed payment of the interest on said certificate when due, and the payment of principal thereof when due, or within eighteen months thereafter, together with in-[fol. 52] terest thereon after maturity at the rate specified in said certificate, until payment of principal is effected or offered, as provided in said certificate.

The Prudence Company, Inc., further certifies and guarantees that the share or part of said bond, mortgage and extension agreement represented by the foregoing certificate is not subordinate to any other share or shares thereof, and is not subject to any prior interest therein.

By the acceptance of this certificate, the holder hereof agrees to the terms and conditions of said guarantee.

Dated —— —, 19—.

The Prudence Company, Inc.. H. E. Merriam, Vice-President, Secretary; O. H. Kelley, Assistant Secretary, Assistant Vice-President.

The Bank of America, New York, hereby certifies that the bond, mortgage and extension agreement referred to in the foregoing certificate; the guarantee of The Prudence Company, Inc., guaranteeing payment of principal and interest; the insurance policies and other instruments and evidences of title relating to said bond and mortgage, as extended; and the appraisal referred to in said certificate; are held by it for the benefit of the holder of said certificate and of any other persons interested in said bond, mortgage and extension agreement, and further certifies that the share or part of said bond and mortgage, as extended, represented by the foregoing certificate, is not and shall not be subordinate to [fol. 53] any other share or shares thereof, and is not and shall not be subject to any prior interest therein.

The Bank of America, New York, further certifies that the foregoing certificate and all other certificates at any time issued, outstanding and certified by it against said bond, mortgage and extension agreement, will not in any event, exceed the amount of principal at the time owing on said bond and mortgage, as extended.

Dated —— —, 19—.

The Bank of America, New York, Depositary, by —— —, ——, Trust Officer.

EXHIBIT "C" ANNEXED TO AFFIDAVIT OF WILLIAM T. COWIN

The Prudence Company, Inc., (hereinafter designated as "this Corporation"), in consideration of One Dollar and the terms of guarantee named below, guarantees to each and every holder of the certificates of participation issued by Prudence-Bonds Corporation in and to a certain bond and mortgage described in Schedule "A" who shall give this Corporation notice and proof of ownership (each and every person and corporation to whom under this clause this guarantee runs being hereinafter included in the designation "the insured"):

First. Payment of interest when due according to the terms of each such certificate issued.

[fol. 54] Second. Payment of the principal, and of every installment thereof, as soon as collected, but in no event later than eighteen months after it shall have become due and payment thereof shall have been demanded in writing by the insured, with regular payment meantime of interest at the rate guaranteed.

Terms of Guarantee

By the acceptance of this guarantee this Corporation is made irrevocably the agent of the insured, until said certificate of the insured be paid, with the exclusive right, but at its own expense, to sue for and receive the proceeds of any policy of title insurance or fire insurance covering the mortgaged premises; and to collect the principal and interest as it falls due on said bond and mortgage aforesaid.

This guarantee is subject to the conditions annexed hereto.

In Witness Whereof, The Prudence Company, Inc., has caused its corporate seal to be hereunto affixed and this instrument to be signed by two of its officers.

Dated the 3rd day of August, 1927.

The Prudence Company, Inc., by (Sgd.) Clifford S. Kelsey, Vice-Pres.; (Sgd.) J. A. Mutke, Asst. Treas. (Seal.)

[fol. 55] Schedule "A"

1. Bond of Burnside Improvement Co. Inc., to 135 Broadway Holding Corporation dated November 19th, 1925, in principal amount $1,200,000.00.

2. Mortgage between the same parties bearing even date therewith and given to secure a like principal amount.

3. Assignment by 135 Broadway Holding Corporation to New York Title and Mortgage Company, dated November 20th, 1925, assigning the above bond and mortgage.

4. Assignment by New York Title and Mortgage Company to The Equitable Trust Company of New York, dated November 20th, 1925, assigning the above bond and mortgage.

* 5. Certified copy of Assignment by The Equitable Trust Company of New York to New York Title and Mortgage Company dated January 27th, 1927, assigning the above bond and mortgage.

* 6. Certified copy of Assignment by New York Title and Mortgage Company to The Prudence Company, Inc., dated June 20th, 1927, assigning the above bond and mortgage.

* 7. Certified copy of Extension Agreement executed between The Prudence Company, Inc., and Burnside Improvement Co. Inc., dated June 20th, 1927, extending the above bond and mortgage.

[fol. 56] * 8. Certified copy of Assignment by The Prudence Company, Inc., to Prudence-Bonds Corporation dated August 3rd, 1927, assigning the above bond and mortgage as extended.

* 9. Certified copy of Assignment by Prudence-Bonds Corporation to The Bank of America, dated August 3rd, 1927, assigning the above bond and mortgage as extended.

10. Title Policy of Title Guarantee and Trust Company, No. 966114, insuring the lien of said mortgage.

11. Appraisal made by Realty Associates dated July 26th, 1927, showing the amount of the issue to be not more than 66⅔% of the estimated worth of the real estate.

12. Policies of fire insurance in the aggregate amount of $1,000,000.00 covering the mortgaged premises.

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* The originals of these instruments will be forwarded to you as soon as we have received them from the Register's Office.

13. Guarantee by The Prudence Company, Inc., dated August 3rd, 1927.

14. Deposit Agreement executed between Prudence-Bonds Corporation and The Bank of America dated.

The Bank of America, by C. W. Devoy.

[fol. 57] Conditions

This Corporation is bound:

1. To conduct, without expense to the insured, any action or proceedings which it may deem necessary to enforce the performance of any covenants contained in said bond and mortgage.

2. To continue this guarantee on any extension of said mortgage, unless this Corporation shall elect to collect the amount secured thereby.

3. To keep the mortgaged premises insured against fire by policies of fire insurance, having mortgagee clause attached issued by companies authorized to do business in the State of New York.

4. To require the owner to pay all fire insurance premiums, taxes, assessments and water rates, which are required to be paid by the terms of said mortgage.

5. To consent to the assignment of this guarantee, subject to the terms thereof, to any subsequent owner and holder of the said participating certificates who shall give this Corporation prompt notice and proof of ownership, unless such notice and proof be given, no subsequent owner or holder shall be entitled to the benefit of this guarantee.

The Insured is bound:

1. To permit this Corporation to collect all interest and the principal secured by said bond and mortgage, and to refrain from collecting any part of the interest or principal [fol. 58] secured by said bond and mortgage except through this Corporation.

2. To permit this Corporation to enforce payment of any sums which may be or become due under said bond and mortgage or under any policy of title or fire insurance issued on the premises covered by said mortgage, and to ren-

der such reasonable assistance to that end as this Corporation may require, but not to incur any expense in so doing.

All notice by the insured to this Corporation or by this Corporation to the insured, required or given under this guarantee, shall be in writing and may be sent by mail.

[fol. 59]

EXHIBIT "D" ANNEXED TO AFFIDAVIT OF WILLIAM T. COWIN.
PRUDENCE REALIZATION CORPORATION

ANALYSIS OF ACQUISITION OF CERTIFICATES IN PORTFOLIO

B&M # MC-695 — BURNSIDE IMPROVEMENT CO., INC.

Cert. No.	*Par Value of Certificate*	*Maturity*	*Ledger Cost*	*Details of Acquisition*	*Amount Cert. Was Acquired for*
849	$6,000.00	1/1/32	$6,000.00	On 7/29/32 Ctf. #315 for $1,000. purchased for par & interest	$ 1,000.00
				On 1/25/33 Ctf. #833 for $3,000. purchased for par & interest	3,000.00
				On 1/26/33 Ctf. #834 for $1,000. & Ctf. #835 for $1,000. reinvested for Olcott Ctf.	2,000.00
					$ 6,000.00
				On 3/1/33 Ctfs. #315, 833, 834, 835 cancelled and Ctf. #847 for $6,000. issued in name of Reconstruction Finance Corporation. On 4/4/33 Ctf. #847 cancelled and Ctf. #849 for $6,000. issued in the name of The Prudence Company, Inc. and on 6/29/39 Ctf. #849 was assigned to Prudence Realization Corporation.	
850	425,212.86	7/1/32	418,372.66	THE FOLLOWING CERTIFICATES WERE REINVESTED FOR NEW SECURITIES:	

Ctf. #	*Face Amount*	*Date of Reinvstment*	*Security Exchanged for*	
713	$ 1,500.00	3/3/32	Jacellen	$ 1,500.00
169	100.00	6/15/32	Olcott	100.00
176	500.00	6/15/32	1081 Park Ave.	500.00
104	300.00	6/28/32	Jatison Construction	300.00
177	500.00	6/21/32	Eton Holding Corp	500.00
237	500.00	6/30/32	Holbrook Hall	500.00
276	652.75	6/24/32	1081 Park Ave.	652.75
341	600.00	6/23/32	120 W. 44th St.	600.00
349	1,000.00	6/20/32	Jatison Construction	1,000.00
409	500.00	6/14/32	Middleton Estates	500.00
339	600.00	6/24/32	Manger	600.00
320	100.00	6/25/32	Manger	100.00
323	100.00	6/25/32	Manger	100.00
324	100.00	6/25/32	Manger	100.00
325	100.00	6/25/32	Manger	100.00
326	100.00	6/25/32	Manger	100.00
327	100.00	6/25/32	Manger	100.00
515	2,000.00	6/7/32	President Apt.	2,000.00
474	500.00	6/27/32	1081 Park Ave.	500.00
537	2,000.00	6/28/32	Eton Holding Corp.	2,000.00
595	300.00	6/30/32	6th Ave. & 55th St.	300.00
735	1,000.00	6/27/32	Manger	1,000.00
736	1,000.00	6/27/32	Manger	1,000.00
47	1,000.00	6/15/32	1081 Park Ave.	1,000.00
48	1,000.00	7/7/32	1081 Park Ave.	1,000.00
56	1,200.00	7/5/32	6th Ave. and 55th St.	1,200.00
383	5,200.00	7/5/32	6th Ave. and 55th St.	5,200.00
62	1,130.11	7/6/32	6th Ave. and 55th St.	1,130.11
65	1,000.00	7/19/32	Blind Brook Lodge	1,000.00

[fol. 60]

Details of Acquisition

Cert. No.	*Par Value of Certificate*	*Maturity*	*Ledger Cost*	*Ctf. #*	*Face Amount*	*Date of Reinvestment*	*Security Exchanged for*	*Amount Cert. Was Acquired for*
				81	$ 1,000.00	7/12/32	6th Ave. & 55th St.	1,000.00
				83	200.00	7/7/32	6th Ave. & 55th St.	200.00
				68	1,500.00	7/8/32	1081 Park Ave.	1,500.00
				115	2,000.00	7/11/32	1081 Park Ave.	2,000.00
				134	500.00	7/8/32	Leriber Construction	500.00
				135	500.00	7/6/32	6th Ave. & 55th St.	500.00
				137	500.00	7/5/32	6th Ave. & 55th St.	500.00
				206	1,000.00	7/9/32	6th Ave. & 55th St.	1,000.00
				218	2,900.00	7/6/32	6th Ave. & 55th St.	2,900.00
				221	1,500.00	7/7/32	1081 Park Ave.	1,500.00
				224	1,000.00	7/8/32	6th Ave. & 55th St.	1,000.00
				233	2,000.00	7/12/32	6th Ave. & 55th St.	2,000.00
				229	2,500.00	7/12/32	6th Ave. & 55th St.	2,500.00
				239	1,000.00	7/8/32	6th Ave. & 55th St.	1,000.00
				254	350.00	7/13/32	Berkshire Hall	350.00
				255	3,000.00	7/2/32	6th Ave. & 55th St.	3,000.00
				288	1,100.00	7/7/32	6th Ave. & 55th St.	1,100.00
				295	500.00	7/1/32	6th Ave. & 55th St.	500.00
				304	1,000.00	7/11/32	6th Ave. & 55th St.	1,000.00
				307	1,380.00	7/11/32	6th Ave. & 55th St.	1,380.00
				371	200.00	7/6/32	6th Ave. & 55th St.	200.00
				403	500.00	7/6/32	6th Ave. & 55th St.	500.00
				468	5,000.00	7/1/32	1081 Park Ave.	5,000.00
				476	1,000.00	7/18/32	6th Ave. & 55th St.	1,000.00
				489	5,000.00	7/9/32	6th Ave. & 55th St.	5,000.00
				507	4,000.00	7/1/32	6th Ave. & 55th St.	4,000.00
				516	4,000.00	7/2/32	6th Ave. & 55th St.	4,000.00
				526	2,000.00	7/5/32	6th Ave. & 55th St.	2,000.00
				542	1,000.00	7/1/32	6th Ave. & 55th St.	1,000.00
				543	300.00	7/16/32	6th Ave. & 55th St.	300.00
				565	1,000.00	7/5/32	6th Ave. & 55th St.	1,000.00
				597	200.00	7/6/32	6th Ave. & 55th St.	200.00
				621	500.00	7/7/32	6th Ave. & 55th St.	500.00
				624	1,000.00	7/2/32	6th Ave. & 55th St.	1,000.00
				734	1,000.00	7/6/42	Part payt. for Guaranteed Mtg. #1596	1,000.00
				742	2,500.00	7/29/32	Colchester	2,500.00
				759	5,500.00	7/14/32	6th Ave. & 55th St.	5,500.00
				810	7,900.00	7/11/32	6th Ave. & 55th St.	7,900.00
				811	7,900.00	7/11/32	6th Ave. & 55th St.	7,900.00
				812	2,300.00	7/11/32	6th Ave. & 55th St.	2,300.00
				813	10,000.00	7/11/32	6th Ave. & 55th St.	10,000.00
				814	5,000.00	7/11/32	6th Ave. & 55th St.	5,000.00
				816	1,000.00	7/11/32	6th Ave. & 55th St.	1,000.00
				817	1,000.00	7/11/32	6th Ave. & 55th St.	1,000.00
				818	1,000.00	7/11/32	6th Ave. & 55th St.	1,000.00
				819	2,900.00	7/11/32	6th Ave. & 55th St.	2,900.00
				820	10,000.00	7/11/32	6th Ave. & 55th St.	10,000.00
				825	1,000.00	7/11/32	6th Ave. & 55th St.	1,000.00
				823	2,000.00	7/2/32	6th Ave. & 55th St.	2,000.00

Details of Acquisition

Cert No.	*Par Value of Certificate*	*Maturity*	*Ledger Cost*	*Ctf. #*	*Face Amount*	*Date of Reinvestment*	*Security Exchanged for*	*Amount Cert. Was Acquired for*
				58	$ 3,000.00	9/8/32	Kew Hall Apts.	$ 3,000.00
				118	1,000.00	8/30/32	Kew Hall Apts.	1,000.00
				127	7,000.00	1/4/33	Jacellen	7,000.00
				155	38,000.00	9/16/32	Park Place Dodge	38,000.00
				210	3,000.00	9/11/32	Kew Hall Apts.	3,000.00
				442	2,000.00	9/14/32	Kew Hall Apts.	2,000.00
				212	400.00	8/4/32	Kew Hall Apts.	400.00
				226	8,500.00	8/19/32	6th Ave. & 55th St.	8,500.00
				272	500.00	12/17/32	Jacellen	500.00
				282	5,000.00	8/17/32	Kew Hall Apts.	5,000.00
				286	3,000.00	8/24/32	6th Ave. & 55th St.	3,000.00
				297	5,000.00	12/15/32	Guaranteed Mortgage # 5927	5,000.00
				298	8,000.00	8/17/32	Guaranteed Mortgage # 10031	8,000.00
				345	1,000.00	7/2/32	6th Ave. & 55th St.	1,000.00
				356	2,000.00	8/2/32	Kew Hall Apts.	2,000.00
				377	250.00	10/6/32	Olcott	250.00
				404	500.00	11/2/32	Jacellen	500.00
				406	1,000.00	7/29/32	Colchester	1,000.00
				506	2,000.00	10/24/32	Jacellen	2,000.00
				509	500.00	12/2/32	Jacellen	500.00
				564	500.00	9/13/32	Park Place Dodge	500.00
				583	3,500.00	8/11/32	Kew Hall Apts.	3,500.00
				594	500.00	8/10/32	Kew Hall Apts.	500.00
				630	600.00	8/5/32	Kew Hall Apts.	500.00
				647	5,000.00	1/20/33	Guaranteed Mortgage # 6612	5,000.00
				656	1,000.00	6/10/32	Kew Hall Apts.	1,000.00
				676	3,000.00	1/9/33	Jacellen	3,000.00
				677	4,000.00	12/5/32	Guaranteed Mortgage # 9318	4,000.00
				680	4,000.00	12/5/32	Guaranteed Mortgage # 1766	4,000.00
				703	1,100.00	8/1/32	Kew Hall Apts.	1,100.00
				788	1,000.00	9/10/32	Kew Hall Apts.	1,000.00

THE FOLLOWING CERTIFICATES WERE PURCHASED:

Ctf. #	*Face Amount*	*Date*	*Price Paid*	
57	$ 2,900.00	9/8/32	Par & Int. as to $1,400.—$1,500. reinv. for Kew Hall	2,900.00
60	2,000.00	11/17/32	Par & Int. as to $600.—$1,200. reinv. for Olcott	2,000.00
63	2,050.00	7/8/32	Par flat as to $1,000.—$1,050. reinv. for 6 Ave. & 55th St.	2,050.00
106	1,000.00	7/8/32	Par flat for entire certificate	1,000.00
120	2,500.00	7/13/32	Par flat as to $1,000.—$1,500. reinv. for 6 Ave. & 55th St.	2,500.00
123	2,000.00	7/6/32	Par flat as to $500.—$1,500. reinv. for 6 Ave. & 55th St.	2,000.00
156	1,500.00	10/4/32	95	1,425.00
184	1,000.00	7/6/32	Par flat as to $600.—$400. reinv. for 6 Ave. & 55th St.	1,000.00
207	1,500.00	7/11/32	Par flat as to $750.—$750. reinv. for 6 Ave. & 55th St.	1,500.00
227	10,000.00	9/16/32	Par flat as to $7,500.—$2,500. reinv. for Park Place Dodge	10,000.00
230	5,000.00	9/2/32	Par & Int. as to $2,000.—$3,000. reinv. for Kew Hall	5,000.00
246	4,000.00	7/5/32	Par flat as to $1,000.—$3,000. reinv. for 6 Ave. & 55th St.	4,000.00
283	6,000.00	7/22/32	Par flat as to $3,000.—$3,000. reinv. for Kew Hall	6,000.00

Details of Acquisition

ar Value of Certificate	Maturity	Ledger Cost	Ctf. #	Face Amount	Date	Price Paid	Amount Cert. Was Acquired for
			287	$ 1,000.00	7/13/32	Par flat as to $500.—$500. reinv. for 6 Ave. & 55th St.	$ 1,000.00
			294	10,000.00	12/15/32	Par & Int. as to $7,000.—$3,000. reinv. for G. M. # 5927	10,000.00
			370	1,000.00	10/13/32	Par & Int. as to $750.—$250. reinv. for Jacellen	1,000.00
			385	100.00	7/7/32	Par flat for entire certificate	100.00
			482	100.00	7/7/32	Par flat for entire certificate	100.00
			392	3,000.00	11/5/32	Par & Int. as to $1,500.—$1,500.00 reinv. for Jacellen	3,000.00
			401	1,000.00	7/8/32	Par flat as to $700.—$300. reinv. for Lerber	1,000.00
			433	1,000.00	7/5/32	Par flat for entire certificate	1,000.00
			490	4,000.00	12/27/32	Par & Int. as to $1,500.—$2,500. reinv. for 983 Park Ave.	4,000.00
			500	2,500.00	11/10/32	Par & Int. as to $625.—$1,875. reinv. for Jacellen	2,500.00
			580	1,000.00	7/18/32	Par flat for entire certificate	1,000.00
			614	500.00	12/6/32	Par & Int. as to $200.—$300. reinv. for Jacellen	500.00
			617	5,000.00	7/7/32	52 flat	2,600.00
			626	1,000.00	7/25/32	Par flat for entire certificate	1,000.00
			629	500.00	7/19/32	Par flat for entire certificate	500.00
			639	1,000.00	10/18/32	95	950.00
			657	1,000.00	8/10/32	Par flat for entire certificate	1,000.00
			673	1,000.00	9/21/32	Par and Int. for entire certificate	1,000.00
			688	200.00	10/6/32	Par flat for entire certificate	200.00
			692	1,000.00	7/21/32	Par & Int. as to $300.—$700. reinv. for Kew Hall	1,000.00
			715	1,500.00	10/28/32	Par & Int. for entire certificate	1,500.00
			723	500.00	7/14/32	Par flat as to $450.—$450. reinv. for Malex	900.00
			725	400.00	7/14/32		
			733	1,000.00	9/1/32	Par & Int. as to $250.—$750. reinv. for Jacellen	1,000.00
			774	10,000.00	10/14/32	Par & Int. as to $1,000.—$9,000. reinv. for 31 W. 72nd St.	10,000.00
			752	1,500.00	9/14/32	Par & Int. as to $750.—$750. reinv. for Park Place Dodge	1,500.00
			777	1,500.00	7/13/32	Par flat as to $1,000.—$500. reinv. for 6 Ave. & 55th St.	1,500.00
			789	2,000.00	8/8/32	Par & Int. as to $400.—$1,600. reinv. for Kew Hall	2,000.00
			796	1,000.00	7/6/32	Par flat for entire certificate	1,000.00
			827	2,000.00	8/1/32	90 plus interest	1,800.00
			131	5,000.00	1/16/33	Par & Int. as to $2,500.—$2,500. reinv. for Jacellen	5,000.00
			188	5,000.00	1/23/33	Par & Int. as to $2,000.00—$3,000. reinv. for Jacellen	5,000.00
			410	8,000.00	1/19/33	Par & Int. as to $3,000.—$5,0000. reinv. for Jacellen	8,000.00
			536	3,000.00	1/9/33	Par & Int. for entire certificate	3,000.00
			458	1,000.00	1/13/33	Par & Int. as to $500.—$500. reinv. for Jacellen	1,000.00
			126	6,000.00	7/6/32	Par flat as to $2,000.—$4,000. reinv. for 6 Ave. & 55 St.	6,000.00
			228	3,000.00	7/1/32	Par flat as to $1,000.—$2,000. reinv. for 6 Ave. & 55 St.	3,000.00
			493	3,000.00	7/1/32	Par flat as to $1,500.—$1,500. reinv. for 6 Ave. & 55 St.	3,000.00
			674	1,000.00	7/1/32	Par flat for entire certificate	1,000.00
			729	100.00	6/30/32	Par flat for entire certificate	100.00
			730	100.00	6/30/32	Par flat for entire certificate	100.00
			740	2,000.00	7/1/32	Par flat as to $500.—$1,500. reinv. for 1111 Park Ave. $1,000. & Eton $500.	2,000.00
			785	1,450.00	7/1/32	Par flat as to $550.—$900. reinv. for 6 Ave. & 55th St.	1,450.00
			530	1,000.00	7/13/32	Par & Int. as to $500.—$500. reinv. for 6 Ave. & 55th St.	1,000.00
			722	2,000.00	6/23/32	Par & Int. as to $500.—$1,500. reinv. for Sherman Sq.	2,000.00
			102	5,000.00	6/27/32	Par flat as to $2,000.—$3,000. reinv. for Sherman Sq.	5,000.00

[fol. 63]

Cert. No.	Par Value of Certificate	Maturity	Ledger Cost	Details of Acquisition	Amount Cert. Was Acquired for
				THE FOLLOWING CERTIFICATES WERE PURCHASED THROUGH THE SO-CALLED PANDER-BUCKBEE-MERRIAM A/C:	
				Ctf. # *Amount* *Date* *Price Paid*	
				258 $ 500.00 12/19/32 66	$ 345.33
				71 10,000.00 1/13/33 69½	7,018.33
				809 1,000.00 9/19/32 81	826.92
				275 500.00 1/10/33 72	363.19
				88 & 90 2,000.00 10/7/32 85	1,742.39
				619 1,600.00 1/23/33 73½	1,188.64
				THE FOLLOWING CERTIFICATES WERE ACQUIRED FROM CREDITS WHICH EXISTED AFTER MANY CANCELLATIONS AND AUTHENTICATIONS:	
				Ctf. # *Amount*	
				802 5,000.00	5,000.00
				803 6,550.00	6,550.00
				$425,212.86	$418,372.66

On 6/28/32 certificates #722 for $2,000. and #102 for $5,000. were cancelled and certificate #824 for $7,000. was issued in the name of George W. Dorfler (Nominee)
On 9/24/32 certificate #809 for $1,000. was cancelled and certificate #830 for $1,000. was issued in the name of John A. Buckbee (Nominee)
On 12/14/32 certificate #88 for $1,000. was cancelled and certificate #836 for $1,000. was issued in the name of George W. Dorfler (Nominee)
On 12/14/32 certificate #90 for $1,000. was cancelled and certificate #837 for $1,000. was issued in the name of George W. Dorfler (Nominee)
On 12/28/32 certificate #268 for $500. was cancelled and certificate #838 for $500. was issued in the name of George W. Dorfler (Nominee)
On 2/16/33 certificate #71 for $10,000. was cancelled and certificate #843 for $10,000. was issued in the name of George W. Dorfler (Nominee)
On 2/16/33 certificate #619 for $1,600. was cancelled and certificate #844 for $1,600. was issued in the name of George W. Dorfler (Nominee)
On 2/16/33 certificate #275 for $500. was cancelled and certificate #845 for $500. was issued in the name of George W. Dorfler (Nominee)
On 3/1/33 certificates #47, 48, 56, 57, 58, 60, 62, 63, 65, 68, 81, 83, 104, 106, 115, 118, 120, 123, 126, 127, 131, 134, 135, 137, 155, 156, 169, 176, 177, 164-168-206-207-210, 212, 218, 221, 224, 226, 227, 228, 229, 230, 233, 237, 239, 246, 254, 255, 272, 282, 283, 286, 287, 288, 294, 297, 295, 298, 304, 307, 320, 276, 323, 324, 325, 326, 327, 339, 341, 345, 349, 356, 370, 371, 377, 383, 385, 392, 401, 503, 404, 406, 409, 410, 433, 442, 458, 468, 474, 476, 482, 489, 490, 493, 500, 506, 507, 509, 515, 516, 526, 802, 803, 824, 830, 836, 837, 843, 844, 845, 530, 536, 537, 542, 543, 564, 565, 580, 583, 594, 595, 597, 838, 614, 617, 621, 624, 626, 629, 630, 639, 647, 656, 657, 673, 674, 676, 677, 680, 688, 692, 703, 713, 715, 723, 725, 729, 730, 733, 734, 735, 736, 749, 742, 752, 759, 774, 785, 788, 789, 777, 796, 810, 811, 812, 813, 814, 816, 817, 818, 819, 820, 823, 825, 827, aggregating $425,212.86 were cancelled and certificate #846 for $425,212.86 was issued in the name of Reconstruction Finance Corporation.
On 4/4/33 certificate #846 was cancelled and certificate #850 for $425,212.86 was issued in the name of The Prudence Company, Inc., and
On 6/29/39 certificate #850 was transferred to Prudence Realization Corporation.

[fol. 64] EXHIBIT "E" ANNEXED TO AFFIDAVIT OF WILLIAM T. COWIN

Amended Plan of Reorganization for The Prudence Company, Inc.

As Proposed by Reconstruction Finance Corporation, April 12, 1938, With Amendments, and as Confirmed by Order of the Court dated May 26, 1939

In Consolidated Proceedings Nos. 27496 and 27028 in the District Court of the United States for the Eastern District of New York for the Reorganization of The Prudence Company, Inc., under Section 77B of the National Bankruptcy Act

Introductory Statement *

The Prudence Company, Inc., is the Debtor in proceedings for reorganization under Section 77B of the National Bankruptcy Act pending in the District Court of the United States for the Eastern District of New York. The accompanying Plan of Reorganization, confirmed by order of the Court dated May 26, 1939, was proposed by Reconstruction Finance Corporation, the Debtor's largest single creditor (hereinafter referred to as the RFC) to provide a sound and equitable method for the realization of the Debtor's assets and the distribution of the proceeds in cash among its creditors.

[fol. 65] The Debtor's unpledged assets consist mainly of cash, miscellaneous investments, real estate, Prudence-Bonds Corporation secured bonds and mortgage participation certificates, first and second mortgages and participations therein, Series B Bonds of Prudence Securities Corporation, notes receivable, and miscellaneous advances and accounts receivable; and the Debtor's liabilities (other than in respect of capital stock) consist mainly of the amount due in respect of the note payable held by the RFC, and

* This statement is not a part of the accompanying Plan, nor does it purport to summarize or otherwise refer to all the material or other provisions of the Plan. In considering the Plan, reference should be made to the full text thereof. Nothing in this statement shall affect the interpretation of the Plan.

amounts due on guarantees of whole mortgages and of Prudence-Bonds Corporation secured bonds and mortgage participation certificates.

From information furnished by the Section 77B Trustee as at the confirmation of the Plan, the claims filed against the Debtor (after deduction for such thereof, including Federal income tax claims and New York State franchise tax claims, as have been withdrawn, released, settled or paid, or separately reorganized or finally disallowed in these proceedings, or ordered so to be, or as are payable out of segregated funds) may be summarized, approximately, as follows, including interest except as noted:

[fol. 66] *Nature of Claim*	*Amount*
(1) Claim of the RFC	$11,848,000 *
(2) Claims arising out of guarantees by the Debtor of obligations of others:	
(a) Guarantees of Prudence-Bonds Corporation secured bonds (excludes Debtor-owned bonds)	58,833,000
(b) Guarantees of Prudence-Bonds Corporation mortgage participation certificates (excludes Debtor-owned certificates)	50,858,000 †
(c) Guarantees of whole mortgages	12,523,000
(3) Miscellaneous claims	151,000 ‡
Total	134,213,000 §

* Upon consummation of the Plan the RFC's claim is to stand allowed in the reduced amount of approximately $11,348,000—see Plan, Article IV, (3h).

† Excludes the 1111 Park Avenue, Park Place Dodge, 100 West 55th Street and Blind Brook issues (fully paid), and the Wortheo and Dryden issues (released).

‡ Excludes Manufacturers Trust Company's claim, settlement of which without payment out of the Debtor's general assets was pending before the Court when the Plan was confirmed.

§ Does not reflect the above mentioned reduction to be made in the RFC's claim.

[fol. 67] There being no feasible way of reorganizing the Debtor as a going concern with a continuing business, the object of the Plan is to facilitate the most advantageous realization of the assets and the most equitable distribution of their proceeds to the creditors. As indicated above, the major portion of the claims against the Debtor arises out of guarantees of whole mortgages and of Prudence-Bonds Corporation secured bonds and mortgage participation certificates. Because of uncertainties in the real estate market it is impossible to tell at this time which bond and certificate issues and which whole mortgages may ultimately be paid in full (with or without a surplus) and which ones may result in a deficiency. It is also believed that the nature of the assets in the Debtor's estate is such that a substantial sacrifice of values would result if the assets were liquidated under the limitations and handicaps necessarily incident to bankruptcy proceedings.

In the light of these considerations, the Plan contemplates the reorganization of the Debtor so as to provide, through the medium of a business organization, for an orderly realization of assets and for a distribution of the proceeds in cash among the Participants in the Plan (as therein defined) in such manner as to take equitable account of the substantial variations in the extent to which they are secured.

With a view to the making of as large and immediate a cash payment as reasonably practicable to the main group of creditors other than the RFC, the Plan, as more fully set forth in Article IV thereof, provides that the RFC will forego, until the Final Distribution under the Plan, its share of the initial cash distribution, thus in effect advanc-
[fol. 68] ing such cash, without interest, for distribution among the Secured Participants (as defined in Article I of the Plan), such Participants consisting chiefly of holders of claims based on the Debtor's guarantee of whole mortgages and of Prudence-Bonds Corporation secured bonds and mortgage participation certificates.

For the purpose of computing the amounts to be thus initially distributed to Secured Participants, such Participants are not required by the Plan to make any offset against the amount of their claims in respect of the value of the security held by them. As to subsequent distributions, the Plan provides in effect that in computing the amounts to be distributed, there shall be an offset against

the Secured Participants' claims to the extent of the value (to be determined as provided in Article V of the Plan) of any security held for their claims (or for the obligations to which their claims relate) whether such security relates to property owned by the Debtor or a third party, an exception being made to the foregoing if such third party is a guarantor or surety for the Debtor,—this because the reduction of any claim against the Debtor by the amount realized against the guarantor or surety would merely give rise to a corresponding claim on his part against the Debtor.

From the inception of these proceedings up to July 6, 1937, the RFC was enjoined from realizing upon its security, and thereafter the RFC refrained from so doing pending negotiations with the Section 77B Trustees with a view to effecting a realization in such a way as to yield the maximum benefit to all creditors. As a result of these negotiations [fol. 69] all of the collateral pledged by the Debtor with the RFC has been sold, under supervision of the Court, and pursuant to orders of the Court providing for certain minimum bids for substantially all of such collateral. The RFC was the sole and exclusive bidder for such collateral by virtue of its bids aggregating approximately $11,323,000. As a result of such sale the RFC is an Unsecured Participant under the Plan as therein defined, and will therefore share in the initial cash distribution only on the basis of its reduced claim, whereas the Secured Participants will share in such distribution without offsetting to any extent the value of their security.

The Judge in these proceedings having found by order dated April 25, 1938, that the Debtor is insolvent, the Plan makes no provision for the stockholders of the Debtor.

AMENDED PLAN OF REORGANIZATION

FOR

THE PRUDENCE COMPANY, INC.

ARTICLE I

Definitions

In this Plan the following terms have the following meanings unless otherwise expressly stated:

Debtor means The Prudence Company, Inc.

[fol. 70] *Section 77B* means Section 77B of the National Bankruptcy Act, including all amendments to date.

Court means the United States District Court for the Eastern District of New York acting in the proceedings under Section 77B with respect to the Debtor.

Section 77B Trustee means the Trustee of the Debtor appointed by the Court.

Plan means this Plan of Reorganization.

Effective Date means the date as of which the Plan is consummated pursuant to the order of the Court.

Record Date means any record date fixed by the Court or otherwise as provided in the Plan, for any appropriate purpose of the Plan.

New Company means the new corporation in which the assets and business of the Debtor's estate are to be vested pursuant to Article III of the Plan.

Creditors means "creditors" as defined in Section 77B(b).

Claims means "claims" as defined in Section 77B(b).

Collateral means (1) the bonds and mortgages and other property, tangible or intangible, real or personal, held as security for any one of the eighteen separate bond issues of Prudence-Bonds Corporation guaranteed by the Debtor; (2) any bond and mortgage or other property, tangible or intangible, real or personal, in which certificates of participation have been issued by Prudence-Bonds Corporation [fol. 71] and guaranteed by the Debtor, or any bond and mortgage or other property, tangible or intangible, real or personal, securing any such certificates of participation or securing any bonds or certificates or other securities issued

or received in exchange for or in lieu of such certificates of participation; (3) any whole single bond and mortgage or interest therein, guaranteed by the Debtor (other than bonds and mortgages, and interests therein, referred to in clauses (1) and (2) of this definition) or property, tangible or intangible, real or personal, acquired upon foreclosure thereof or by deed in lieu thereof or in exchange for such bond and mortgage, or interest therein, or for any such property, and in case of the sale of property so acquired, any purchase money bond and mortgage on such property taken back on such sale by the mortgagee.

Participant means a holder of a finally allowed claim against the Debtor upon which claim the Debtor is personally liable. Unless otherwise indicated by the context, such term shall be deemed to include the assignee of a Participant claiming under a valid assignment in writing duly filed with the Section 77B Trustee or the New Company as the circumstances of the case may reasonably require.

Secured Participant means a Participant whose claim (or the obligation to which his claim relates) was secured, on February 1, 1935, by either (a) Collateral, or (b) security other than Collateral (unless such other security consisted of property or an obligation of a guarantor of or surety for the Debtor in respect of such claim); provided, however, [fol. 72] that no Participant who (or whose predecessor in interest) held, on February 1, 1935, security of the character referred to in the foregoing subdivision (b) which security, prior to the Effective Date, has been sold or realized upon in its entirety, shall be deemed a Secured Participant. No property acquired by a Participant (or his predecessor in interest) prior to February 1, 1935, through the entire foreclosure of a Single Mortgage, as hereinafter defined, shall be deemed to have been held on February 1, 1935, as security for such Participant's claim based upon the guarantee by the Debtor of such Single Mortgage, and such Participant shall not be deemed a Secured Participant with respect to such claim. Each Prudence Bond Participant and Prudence Certificate Participant, as hereinafter respectively defined, shall be deemed a Secured Participant.

Unsecured Participant means a Participant who is not a Secured Participant.

RFC means Reconstruction Finance Corporation, its successors and assigns.

Prudence Bond means any bond issued by Prudence-Bonds Corporation and guaranteed by the Debtor.

Prudence Certificate means any certificate of participation in a bond and mortgage issued by Prudence-Bonds Corporation and guaranteed by the Debtor.

Single Mortgage means any bond and mortgage or interest therein guaranteed by the Debtor other than (a) any bond and mortgage in respect of which Prudence Certifi- [fol. 73] cates have been issued, or (b) any bond and mortgage constituting part of the Collateral securing any issue of Prudence Bonds.

Prudence Bond Participant means a Participant whose claim is based on the guarantee by the Debtor of a Prudence Bond.

Prudence Certificate Participant means a Participant whose claim is based on the guarantee by the Debtor of a Prudence Certificate or of a bond and mortgage as to which Prudence Certificates have been issued.

Reserved Right Participant means a person who, between February 1, 1935 and the Effective Date, disposed of his Prudence Bond or Prudence Certificate (or of an instrument representing a beneficial interest therein, such as, but not necessarily limited to, a Trustee's certificate) and who, by proof filed with the Clerk of the Court on or before July 15, 1939, establishes to the Court's satisfaction that, upon such disposition, he reserved to himself the rights against the Debtor based upon the Debtor's guarantee of such Prudence Bond or Prudence Certificate.

New Company's Register means the register to be kept by the New Company as provided in paragraph 3(e) of Article IV hereof.

Appraisers means the appraisers selected to value the Collateral and other security as provided in Article V hereof.

New Loan Value of a parcel of real estate means the amount of money which, in the sworn opinion of the Ap- [fol. 74] praisers, on the basis of the appraised value of such real estate arrived at as provided in Article V hereof, would constitute at the Effective Date a reasonable new first mortgage loan on such real estate, at the rate of interest and upon the terms found by the Appraisers to be then current for such loans; provided, however, that unless all three Appraisers agree that such New Loan Value is less than

two-thirds of such appraised value, such New Loan Value shall be fixed at not less than two-thirds of such appraised value.

The phrase *obligation to which a claim relates* or its substantial equivalent means the obligation, or interest therein, on which (or on the guarantee of which), such claim is based and shall be deemed to include any obligation or interest therein issued in lieu of, or in exchange for, such obligation or interest therein.

Article II

Parties Not Affected by the Plan

Creditors whose claims against the Debtor have, prior to the Effective Date, been paid in full, or expressly withdrawn, released or compromised, or expunged by order of the Court, are not affected by the Plan and the Plan makes no provision for them. These creditors include the holders of the Debtor's Guaranteed Collateral Trust 5½% Gold Bonds, due May 1, 1961, of the Debtor's First Mortgage Group Certificates, Series B, and of the so-called Worthco, Dryden, 1111 Park Avenue, Park Place Dodge, 100 West 55th Street and Blind Brook issues of Prudence Certificates. [fol. 75] The assets of the Debtor which are subject to claims for which the Debtor is not personally liable are to be vested in the New Company subject to such claims; accordingly, no separate or additional provision is made in the Plan with respect to the holders of such claims and they are not affected by the Plan.

The Judge in these proceedings having found by order dated April 25, 1938, that the Debtor is insolvent, the stockholders of the Debtor are not affected by the Plan and the Plan makes no provision for them.

Article III

The New Company

On the Effective Date, or as soon thereafter as practicable, the business conducted at the time being by the Section 77B Trustee and all assets of whatever nature in the Debtor's estate shall be vested in a new corporation to be formed for the purpose (i. e., the New Company) free and clear of all claims and interests of the Debtor, its stock-

holders and creditors, and others, except the following which shall remain outstanding:

(1) such tax or other finally allowed claims, if any, as the Court may determine to have priority, and the items provided for in Article VIII hereof,

(2) finally allowed claims against the property of the Debtor in respect of which the Debtor is not personally liable, and

(3) finally allowed claims of the character which shall entitle the holders thereof to be deemed Participants as defined in Article I hereof;

[fol. 76] provided, however, that all causes of action or rights in the Debtor's estate against present or former officers or directors of the Debtor, and against other parties arising out of or relating to the transactions giving rise to such causes of action or rights, shall remain in the Section 77B Trustee, subject to being vested in the New Company when so ordered by the Court; pending such order, such causes of action or rights shall be prosecuted or otherwise disposed of for the benefit of the New Company in such manner as the Section 77B Trustee, with the approval of the Court, shall determine. All expenses of such prosecution or other disposition shall be borne by the New Company, subject to order of the Court, and the net proceeds thereof shall be paid to the New Company.

As sole consideration for the vesting of such business and assets in the New Company as aforesaid, the New Company shall issue all of its authorized capital stock as hereinafter in this Article III more fully provided.

The claims referred to in the foregoing subdivision (2) shall be payable only out of the property against which they are claims.

The claims and items referred to in the foregoing subdivisions (1) and (3) shall be paid by the New Company, but only as follows:

The claims and items referred to in the foregoing subdivision (1) shall be paid in full in due course out of the New Company's assets. Such claims and items shall not constitute liens upon such assets, but shall have priority over all distribution to Participants under the Plan and over all liabilities incurred by the New Company; and the

[fol. 77] New Company shall be entitled to sell all or any part of such assets free and clear of any charge in respect of such claims and items.

The claims referred to in the foregoing subdivision (3) shall not constitute liens upon the New Company's assets, and the New Company shall be entitled to sell all or any part of such assets free and clear of any charge in respect of such claims; provided, however, that nothing herein contained shall be deemed to affect the lien, if any, to which any part of such assets was subject, immediately prior to the vesting thereof in the New Company, in respect of any such claim. The claims referred to in such subdivision (3) shall be payable, without interest, only as provided in Article IV hereof and only to the extent that the New Company's assets shall be sufficient to pay them, after reserving from such assets $70 for the New Company's capital and $70 for its surplus, and after payment of or provision for (i) the claims and items referred to in the foregoing subdivision (1) and (ii) such liabilities as may be incurred by the New Company. Such surplus shall be available to pay for stock which may be purchased by the New Company under the options hereinafter in this Article III provided for.

The name of the New Company shall be "Prudence Realization Corporation" or such other name as the Court may approve. The New Company shall not engage directly or indirectly in any business other than the business of administering, conserving and realizing upon its assets in an orderly manner, and of conducting the "servicing" and any other business activities that (a) are vested in the New Company as herein provided, or (b) may be undertaken by the New Company, upon vote of its Board of Directors, with [fol. 78] respect to Prudence Bonds, Prudence Certificates and Single Mortgages, or securities or mortgages or interests therein issued in exchange therefor, or in payment or part payment thereof, or in lieu thereof; provided, however, that the foregoing restrictions shall in no way impair or otherwise affect the validity or binding effect of any transaction within the scope of the purposes, objects and powers set forth in the New Company's certificate of incorporation or entered into by the New Company in the exercise of any power, right or privilege vested in it by law, and provided, further, that if any question shall otherwise arise as to whether any activity of the New Company exceeds such restrictions, the judgment of the Board of Di-

rectors, evidenced by a resolution thereof concurred in by directors of each class, shall be conclusive in the absence of a showing of bad faith.

Appropriate steps shall be taken for the incorporation of the New Company as a stock corporation under the laws of the State of New York, with an authorized capital stock consisting of seven shares of capital stock without par value, of which five shares shall be designated as Class A Stock and two shares as Class B Stock.

The entire authorized capital stock of the New Company shall be issued, and such stock, together with all dividends and distributions in respect thereof, shall be held and disposed of, as in this Article III and in Article IV set forth. No dividend or other distribution shall be paid or made upon or in respect of the New Company's capital stock until all Participants become Paid-Up Participants as defined in [fol. 79] paragraph 3(a) of Article IV hereof, and each such share of stock shall be subject to repurchase by the New Company from the holder thereof upon vote of its Board of Directors concurred in by not less than five directors, including at least one Class B director.

The Board of Directors of the New Company shall consist of seven directors, of whom five shall be designated as Class A directors and two shall be designated as Class B directors. After the designation of the initial directors of the New Company as hereinafter provided, the Class A Stock shall be entitled to elect the Class A directors and the Class B Stock shall be entitled to elect the Class B directors. Cumulative voting shall be provided for so that each share of Class A Stock shall be entitled to elect one Class A director and each share of Class B Stock shall be entitled to elect one Class B director. Except as aforesaid, there shall be no distinction between the Class A Stock and the Class B Stock. With the unanimous approval of the directors then in office, the Board of Directors may provide for an Executive Committee of the Board. A majority of such Committee shall be Class A directors and one member thereof shall be a Class B director.

The initial directors shall be designated as follows:

(a) Four of the initial Class A directors shall be designated by the Court. On or before such date as the Court may determine, creditors (other than the RFC) may file with the Court written suggestions as to per-

sons to act as such four Class A directors, but the Court shall be free to make each such designation without regard to whether the name of the person so designated has been so suggested.

[fol. 80] (b) Each creditor holding a claim in respect of a Prudence Bond, Prudence Certificate or Single Mortgage shall be entitled to file with the Section 77B Trustee, at any time prior to the confirmation of the Plan or such earlier date as the Court may fix, his written nomination of the remaining Class A director. The person so nominated by the creditors holding in the aggregate the largest principal amount of such claims shall be deemed designated as such Class A director.

(c) The initial Class B directors shall be designated by the RFC.

The certificate of incorporation or the by-laws of the New Company shall provide, in effect, that to qualify as such from and after the Effective Date, directors shall be stockholders.

The entire capital stock of the New Company (to consist, as aforesaid, of five shares of Class A Stock and two shares of Class B Stock) shall be issued to the Section 77B Trustee acting on behalf of the Debtor, as sole consideration for and upon the transfer to and the vesting in the New Company of the business and assets of the Debtor's estate as above provided in this Article III. The Section 77B Trustee shall forthwith upon the issuance of said stock assign and transfer one share of Class A Stock to each of the five initial Class A directors and one share of Class B Stock to each of the two initial Class B directors. Upon the receipt of such stock and in consideration for the transfer and assignment thereof to him, each such person shall enter into a written agreement with the New Company to the [fol. 81] effect that he accepts the same for the purposes and subject to the restrictions of the Plan and subject to the option of the New Company to repurchase such share at any time upon the payment to him of the sum of $10.00, and that throughout his term of office he will continue to hold such share. Each such person shall also agree to and shall endorse the certificate for his share of stock in blank and deposit the same with the New Company as security for the performance of such agreement.

Beginning with the year following the Effective Date, annual meetings of the stockholders shall be held for the purpose of electing directors. Each holder of a share of Class A Stock shall be entitled, in his discretion, to vote such stock for the election of himself as a Class A director, and each holder of a share of Class B Stock shall be entitled, in his discretion, to vote such stock for the election of himself as a Class B director. The certificate of incorporation of the New Company shall provide, in effect, that if any vacancy shall occur in the office of a Class A director, his successor shall be elected by the remaining holders of the Class A Stock, and that if any vacancy shall occur in the office of a Class B director, his successor shall be elected by the remaining holder of the Class B Stock; provided, however, that if any such vacancy shall not be so filled within the thirty days following its occurrence, such vacancy may be filled by a majority vote of the holders of all the issued and outstanding stock of the New Company, without distinction between Class A Stock and Class B Stock and without cumulative voting. If the offices of both Class B directors shall be vacant at any one time, the RFC [fol. 82] (or its assignee on the New Company's Register) shall be entitled, within the thirty days following the occurrence of the second vacancy, to nominate the persons to be elected as the succeeding Class B directors; and appropriate provision to this effect shall be made in the written agreements to be entered into between the New Company and the holders of Class A Stock pursuant to the foregoing paragraph of this Article III.

If any director shall cease to be such, by virtue of his death, resignation, failure of re-election, or otherwise, the New Company shall exercise its option, hereinabove provided for, to purchase the share of stock of the New Company theretofore held by such director. In such event, or in the event that the New Company shall for any other reason have repurchased a share of stock from any director, as hereinabove provided, and his office shall have become vacant because of his resulting disqualification, the share of stock so acquired by the New Company shall be transferred to the person elected to fill such vacancy, against payment to the New Company of the sum of $10.00, and such person shall thereupon enter into a written agreement with the New Company with respect to such stock to the same effect

as the agreement made by his predecessor with the New Company, and shall also agree to and shall endorse the certificate for such share in blank and deposit the same with the New Company as security for the performance of his said agreement.

Except as otherwise provided in the Plan, the Board of Directors of the New Company shall act by a majority vote of a quorum which shall consist of not less than four directors. Each director shall be entitled to compensation [fol. 83] not exceeding $1200 per annum, but, by vote of the Board of Directors concurred in by at least one director of each class, additional compensation may be paid to any director for his services as an officer of the New Company or for other special services. The aggregate compensation paid to the principal officers of the New Company during the first year following the Effective Date shall not exceed an amount approved by the Court as fair and reasonable.

Within three months after the close of each fiscal year, the Board of Directors shall cause a certified public accountant or a firm of certified public accountants selected by it, to examine the books and records of the New Company, and to submit to the Board of Directors a report which shall include a financial statement with respect to the operations of the New Company and its distributions to Participants during such fiscal year, and a balance sheet as of the close of such fiscal year. The New Company shall keep such report on file, open to the inspection of any Participant during reasonable business hours.

Upon completion by the New Company of the realization of all its assets and the distribution in cash among the Participants of the net proceeds thereof as more fully provided in Article IV hereof, the Board of Directors of the New Company shall take such action as shall be appropriate to terminate the corporate existence of the New Company and to surrender and cancel all the stock of the New Company.

[fol. 84] Article IV

Disposition of the New Company's Assets

1. *Initial Distribution of Cash.* As soon as practicable after the Effective Date, the cash vested in the New Company as provided in Article III hereof (over and above

such amount as may be refained by the New Company, with the approval of the Court, for current expenses and for the claims and items referred to in subdivision (1) of Article III hereof) shall be distributed among the Participants *pro rata* subject to the conditions set forth in this Article IV; provided, however, that the amount of cash which the RFC would be entitled to receive upon such *pro rata* distribution shall be distributed among the Secured Participants, and provided further, that for the purpose of computing the amount of any distribution to be made under this paragraph 1 no offset shall be made against the amount of the claim of any Secured Participant in respect of the value of the Collateral or other security securing his claim or the obligation to which his claim relates.

2. *Realization of Assets and Subsequent Distributions to Participants.* The New Company shall proceed, as promptly as deemed advisable by its Board of Directors in the interests of the Participants, with an orderly realization of its assets and the eventual reduction thereof to cash. From time to time and subject to the conditions hereinafter in this Article IV set forth, the New Company shall distribute such cash (after making payment of or appropriate provision for its expenses and liabilities) *pro* [fol. 85] *rata* among the Participants until all the Participants become Paid-Up Participants as defined in paragraph 3(8) of this Article IV; provided, however, that

(i) no distribution shall be made, prior to the Final Distribution referred to in subdivision (iv) below, unless the cash available therefor shall amount to at least $250,000;

(ii) except as otherwise expressly provided for in clause *First* of subdivision (iv) below, each Participant, for the purpose of all distributions under this paragraph 2, shall be entitled to participate in the proportion that (a) his claim, minus the applicable deductions provided for below in this subdivision (ii), bears to (b) the total claims of all Participants, minus the aggregate of such deductions; the said deductions to be made from the claim of each Secured Participant for such purpose to consist of (1) the *pro rata* value (determined pursuant to Article V hereof) of all Collateral or other security securing his claim or the obligation

to which his claim relates, plus (2) the *pro rata* share of the total amount of cash received or realized subsequent to February 1, 1935 (the date as of which the Court approved the Debtor's petition for reorganization) and prior to the Effective Date in respect of the principal amount or corpus of any Collateral or other security which, at any time during such period, secured his claim or the obligation to which his claim relates, such cash deduction to include, in case such obligation has been purchased by a sinking or retirement fund, [fol. 86] the amount of cash paid in respect of such principal amount or corpus upon such purchase; provided, however, that

(a) if, in the judgment of the Board of Directors, no definitive proration should be made of the value of the Collateral or other security for a particular certificate issue, due to uncertainty whether certificates of such issue held in the Debtor's estate on the Effective Date are on a parity with other certificates of such issue, the deduction to be made pursuant to the foregoing clause (1) shall be based in the first instance on the assumption that the certificates so held in the Debtor's estate are not entitled to parity, and an appropriate reserve shall be established by the New Company to provide for the additional distribution to be made to certificate holders of such issue if the Board of Directors shall be later satisfied that such parity exists; the Board of Directors being authorized to discontinue such reserve if and when satisfied that such parity does not exist;

(b) in determining whether or not any cash received or realized as specified in the foregoing clause (2) was in respect of principal, the New Company may rely upon the designation made, in connection with the payment thereof, by the payor or distributing agent, or if no designation was so made, then upon any designation made by an order of any court having jurisdiction in the premises or by the provisions of any applicable consummated plan of reorganization, or, in the [fol. 87] absence of any such designation, upon the advice of counsel; and

(c) no cash shall be deemed to have been so received or realized, upon a foreclosure sale, by the owner of the

lien foreclosed, or an interest therein, if and to the extent that his distributive share of the proceeds of such sale were applied by him in payment for the property sold or an interest therein;

(iii) prior to such Final Distribution, no distribution shall be made under this paragraph 2 unless after such distribution there will remain in the New Company assets which have, in the judgment of the Board of Directors (concurred in by directors of both classes), a realizable cash value of at least twice (a) the amount of the RFC's share in the initial cash distribution which was distributed to the Secured Participants pursuant to paragraph 1 of this Article IV, plus (b) an amount sufficient to pay all expenses and liabilities of the New Company, theretofore and thereafter to be incurred;

(iv) when the assets of the New Company have been reduced to such an extent that, due to the limitations of the foregoing subdivision (iii), no distribution other than the Final Distribution can be made, the New Company shall proceed as promptly as practicable with the realization of such assets, and from time to time as cash becomes available shall make distributions as follows, the last such distribution to include the amounts theretofore reserved by the New Company in respect [fol. 88] of its capital and surplus (all distributions made under this subdivision (iv) being collectively designated as the Final Distribution):

First: To the RFC, until the RFC shall have received (from the Final Distribution) the same percentage on its claim as the Secured Participants shall theretofore have received under the Plan upon their respective unreduced claims from the initial distribution provided for in paragraph 1 of this Article IV.

Second: After making appropriate provision for the actual and estimated expenses and liabilities of the New Company theretofore and thereafter to be incurred, *pro rata* to all Participants, including the RFC.

If and when all Participants become Paid-Up Participants as defined in paragraph 3(a) of this Article IV, any remaining proceeds of the realization of the New Com-

pany's assets not required to meet its actual and estimated expenses and liabilities theretofore and thereafter to be incurred shall be distributed upon the New Company's stock; and the then directors of the New Company who, as stockholders, shall be entitled to receive the amount so distributed shall forthwith cause such amount to be distributed among the Participants in the manner and subject to the conditions provided in this paragraph 2 and in the following paragraph 3 of this Article IV.

3. *General Conditions Relative to Distributions.* The following shall apply to all distributions made pursuant to this Article IV:

[fol. 89] (a) When from all sources (whether from the New Company or otherwise) the full amount of a Participant's claim, as finally allowed in these proceedings, shall have been realized in cash in respect of the obligation to which such claim relates (or in respect of any property acquired either in connection with the collection of such claim or obligation, or by deed in lieu of foreclosure or in exchange for any such obligation or any property so acquired) such Participant shall be deemed a Paid-Up Participant and shall not be entitled to share further in any distribution under the Plan until all other Participants become Paid-Up Participants. Nothing in the Plan shall impose any duty on the directors of the New Company to inquire as to amounts so realized from sources other than the New Company; nor shall any director be liable, in the absence of bad faith, on account of any distribution or portion thereof made to anyone not entitled thereto. No Secured Participant shall be under any obligation to account to the New Company or to any other Participant or otherwise because the amounts paid to him and his predecessors in interest in accordance with the Plan, together with the *pro rata* share of amounts realized on the Collateral or other security securing the obligation to which his claim relates, are in excess of such claim.

(b) The Board of Directors of the New Company shall fix an appropriate Record Date with respect to each distribution.

(c) Distributions payable to Prudence Bond Participants and to Prudence Certificate Participants shall be made (1) to Reserved Right Participants registered as such on the

[fol. 90] New Company's Register pursuant to subdivision (c) of this paragraph 3; (2) to Prudence Bond Participants and Prudence Certificate Participants, other than Reserved Right Participants and those referred to in subdivision (d) below, as follows:

(i) to the persons whose names are certified to the New Company by the custodian of the register of the particular issue or series, as the case may be, as the registered holders thereof (or of instruments representing beneficial interests therein, such as, but not necessarily limited to Trustees' certificates) at the close of business on the applicable Record Date, excluding bonds or certificates, if any, in respect of which distributions are to be made to Reserved Right Participants; such distributions to be made by checks drawn to the order of such persons and mailed to them at their addresses as certified by the custodian of the appropriate register, or delivered to them in person;

(ii) to the custodian of the sinking or retirement fund of the particular issue or series as the case may be, in respect of bonds or certificates certified by such custodian to have been purchased by such fund, excluding bonds or certificates, if any in respect of which distributions are to be made to Reserved Right Participants; and

(iii) in the case of Prudence Bonds or Prudence Certificates as to which no such certification is given (excluding bonds or certificates, if any, in respect of [fol. 91] which distributions are to be made to Reserved Right Participants), distributions shall be made to the persons presenting the same for notation of the making of such distributions.

The New Company shall be fully protected and discharged from all responsibility with respect to all distributions made as in this subdivision (c) provided.

(d) Distributions payable to Prudence Certificate Participants (other than Reserved Right Participants) in respect of guarantee claims on any issue of Prudence Certificates for which no register (other than the New Company's Register) is being maintained for the recordation of current transfers (such as, but not necessarily limited

to, the so-called Hotel Taft and Langham issues) shall be made, in the first instance, to such persons as shall present such Certificates to the New Company for registration as provided below or as shall submit to the New Company proof satisfactory to it of their ownership of such Certificates. The New Company shall register as a Participant, in respect of the guarantee claim on any such Certificate, the person first presenting such Certificate or such proof as aforesaid, and thereafter distributions in respect of such claim shall be made to such Participant or his registered assignee as provided in the following subdivision (e). The New Company shall be fully protected and discharged from all responsibility with respect to all distributions made as in this subdivision (d) provided.

[fol. 92] (e) The New Company shall keep a Register of the names and addresses of all Participants, except Prudence Bond Participants and Prudence Certificate Participants to whom distributions are to be made as provided in clause (2) of the foregoing subdivision (c) of this paragraph 3. The Section 77B Trustee shall prepare and deliver to the New Company a list, as of the Effective Date, of all Participants (except Prudence Bond Participants and Prudence Certificate Participants) showing, in the case of each such Participant, his name and address, and the nature and amount of his claim or claims; and such list shall constitute the New Company's Register as of the Effective Date. The New Company shall be protected in all respects in relying upon such list as correct as of the Effective Date.

Upon receipt by the New Company of an appropriate written assignment, duly executed and acknowledged by a person registered as a Participant in the New Company's Register and specifying the name and address of such assignee (or, in the New Company's discretion upon receipt of such other evidence of assignment as shall be satisfactory to the New Company), the name and address of such Participant shall be stricken from the New Company's Register and the name and address of his assignee substituted. Unless and until the New Company shall have received a written assignment as aforesaid by a person registered as a Participant in the New Company's Register (or, if the New Company, in its discretion, shall consent to accept other evidence of assignment, unless and until the fact of such assignment shall have been recorded in the New Company's Reg-

[fol. 93] ister), the New Company shall not be affected by notice of any assignment by such person and shall be protected in all respects in treating such person as a Participant, notwithstanding such an assignment or the receipt of notice thereof by the New Company.

Distributions payable to Participants registered as such in the New Company's Register shall be made to such Participants of record at the close of business on the appropriate Record Date, by checks drawn to their order and mailed to them at their addresses as shown in the New Company's Register, or delivered to them in person. The New Company shall be fully protected and discharged from all responsibility with respect to all distributions made as in this subdivision (c) provided.

(f) The New Company, upon notice to the Participants affected, may deposit any amount distributable under the Plan in a bank or trust company which is a member of the New York Clearing House Association (or, if the New Company shall so elect, in the case of Prudence Bond Participants and Prudence Certificate Participants, with the custodian of the register of the particular issue or series) as a trust fund for the benefit of such Participants, with appropriate instructions as to the disbursement of such amount, such action to fully protect the New Company and discharge it from all responsibility with respect to such distribution.

(g) The realization of the New Company's assets and the reduction thereof to cash to be made pursuant to this Article IV shall be completed, and all distributions under [fol. 94] the Plan to Participants shall be made within five years from the Effective Date; provided, however,

(1) that if so determined by vote of the Board of Directors (concurred in by directors of both classes) the New Company, at least one hundred and eighty days prior to the termination of such five-year period, may give notice to the Participants (by publication or otherwise in such manner as the Board of Directors by such vote may specify) that in the judgment of the New Company it would be in the interests of the Participants to continue the activities of the New Company, for the purposes of the Plan, for a further specified period not exceeding an additional five years (sub-

ject to earlier termination by majority vote of the whole Board of Directors); and

(2) that in case such notice is so given the New Company's activities shall be so continued (i) if prior to the expiration of ninety days from the giving of such notice, a majority in amount of the Participants shall not have filed written objection thereto, or (ii) in case affirmative approval of such continuation is legally required, then if such affirmative approval shall have been effectively given within such ninety-day period.

(h) The RFC's claim as a Participant shall be allowed in the amount of $11,347,775.50, without prejudice to such right as the RFC may have, under the provisions of Section 77B(c)(9), or other applicable provisions of law, to [fol. 95] be compensated for services rendered and to be reimbursed for expenses incurred in connection with the proceedings and the Plan.

(i) Unless prior to the Effective Date his claim (1) shall have been expressly withdrawn, released or compromised, or (2) shall have been expunged by order of the Court, no action taken subsequent to February 1, 1935, by or on behalf of any holder of a guarantee claim against the Debtor with respect to his Collateral shall bar any such claimant from participating in the benefits of the Plan to the extent herein provided.

Article V

Valuation of Collateral and Other Security:

For the purposes of the distributions provided for in paragraph 2 of Article IV of the Plan, the Collateral or other security securing, on the Effective Date, the claim of any Secured Participant or the obligation to which such claim relates, shall be valued (in accordance with the limitations hereinafter in this Article V prescribed) at the reasonable value thereof as at the Effective Date by three salaried individual Appraisers to be employed by the New Company, each of whom shall be a real estate appraiser of recognized standing or a Professional Engineer within the meaning of Article 55 of the Education Law of the State of New York.

The Appraisers shall be selected in the manner hereinafter set forth and shall be controlled in the making of such valuations by the following limitations:

[fol. 96] (a) In any case in which the Collateral or other security shall include a mortgage upon real estate, the value of the mortgage shall be deemed to be the New Loan Value of such real estate less the amount owing on any liens or encumbrances which are senior to the lien of such mortgage;

(b) In any case in which the Collateral or other security shall include real estate, the value of such real estate shall be deemed to be the New Loan Value of such real estate less the amount owing on any liens or encumbrances thereon;

(c) In determining the value of the bond secured by any mortgage or the value of any other obligation to be valued under the Plan, the Appraisers shall take into consideration the reasonable probability of collecting thereon under any then existing laws and the probable cost of effecting such collection, and shall estimate as nearly as practicable the net amount which might be reasonably realized therefrom.

The Appraisers shall in each case furnish a report to the New Company in the form of an affidavit of appraisal, which shall be deemed to be made in these proceedings, which shall set forth the pertinent facts and circumstances upon which the appraisal is based, including the appraised value of the real estate as of the Effective Date in every case where the Collateral or other security shall include or consist of real estate or a mortgage upon real estate. Whenever the appraised value of real estate is set forth in an affidavit there [fol. 97] shall also be included a statement that in arriving at such valuation the Appraisers have taken into consideration among other elements, the earnings of such real estate, the land value, the value of any improvements thereon, the replacement costs of such improvements, recent sales of real property, if any, in the vicinity, the assessed value of the property, the type of improvement and present demand for space of such a character, the adequacy of the improvement, depreciation, obsolescence, neighborhood trends, the general condition of the improvement, the cost of making

necessary repairs and of modernization if any be required, the amount of real estate taxes to which the property is subject, the cost of operation, if a hotel the general character of its management, and all other factors which in the opinion of the Appraisers have a bearing upon such valuation.

The Appraisers shall act by a majority vote, but if no two of their opinions shall agree with respect to an appraisal or a New Loan Value, then (subject to the proviso hereinabove contained in the definition of New Loan Value) the appraisal or New Loan Value, as the case may be, shall be the average of the amounts fixed therefor by each Appraiser.

All valuations (a) shall be made and submitted in writing to the Court within six months from the Effective Date unless the Court, for cause shown, shall extend such period; (b) shall be noticed to such creditors and in such manner (by publication, mail or otherwise) as the Court may determine; and (c) in the case of the valuation of each item, shall become final for all purposes of the Plan unless, within such [fol. 98] time as the Court may fix, written objections to such valuation shall be filed with the Court by not less than 10% in amount of the Secured Participants secured by such item, or by the duly authorized trustee or other representative of such amount of Secured Participants, or by not less than 10% in amount of the Unsecured Participants. In the event of the filing of any such objection as aforesaid, the same shall be brought on for hearing before the Court by the New Company in accordance with such procedure as the Court shall specify, and the determination of the Court as to such objection shall be final, without appeal by any party to any court of appellate jurisdiction.

Each Appraiser shall serve for such salary as shall be specified by the Board of Directors of the New Company and shall be selected in the following manner: one by the majority vote of the Class A directors; one by the Class B directors; and one by the concurring vote of (a) a majority of the Class A directors, and (b) the two Class B directors. All three selections shall be made within fifteen days after the Effective Date and shall be submitted forthwith to the Court and be subject to its approval. If (i) the selection of an Appraiser shall not have been so made and submitted by the directors, or (ii) the Court shall have disapproved a selection and no substitute selection shall have been made by the directors within fifteen days after such disapproval,

a vacancy shall be deemed to exist which shall be filled by designation of the Court from a panel of names of appraisers which the directors of the New Company, severally or jointly, shall submit to the Court. In the event that any Appraiser shall resign, die or become incapable of acting, [fol. 99] a successor shall be appointed in the same manner as provided for the appointment of his predecessor. The salaries of the Appraisers and all other expenses incidental to their work shall be paid by the New Company.

Article VI

Acceptance of the Plan

The Plan makes no separate provision for creditors who do not accept it, but treats both assenting and dissenting creditors alike. Accordingly the Plan shall not become operative or be confirmed by the Court unless duly accepted by or on behalf of creditors holding two-thirds in amount of the claims of each class whose claims have been allowed and would be affected by the Plan.

Article VII

Tax Claims of the United States of America *

The United States Collector of Internal Revenue has filed claims for income taxes in these proceedings against the Debtor. Such tax claims shall have the same priority and preference, if any, and the same remedies shall exist for their collection, as if the proceedings for the reorganization [fol. 100] of the Debtor had not intervened. All statutes of limitation upon the collection of such tax claims shall be suspended during the time the proceedings for the reorganization of the Debtor are pending and, if such tax claims shall be adjudged to be a lien upon, or to be entitled to priority or preference with respect to, the assets of the Debtor, for such additional period of time as such claim or any part

* After the proposal of the Plan, such claims in respect of all taxable periods prior to January 1, 1937, were compromised pursuant to the Court's order of May 5, 1938, and payment in full has been made of the compromised claims. In addition, the Federal tax return for the calendar year 1937 has been audited and no tax found due.

thereof remains unpaid. Subject to its approval the Court shall retain jurisdiction over the assets of the Debtor (including the assets to be vested in the New Company pursuant to Article III hereof) and over all parties appearing in the proceedings for the reorganization of the Debtor for the purpose of carrying out and giving effect to any and all provisions of the Plan and the decree confirming the same, in so far as the Plan as so confirmed affects and applies to such tax claims.

Article VIII

Expenses of the Proceedings and the Plan

Payment shall be made, as provided in Article III hereof, of (1) the expenses of the proceedings and the Plan, as approved by the Court, including all costs of administration and other allowances made or to be made by the Court to such parties as the Court may deem entitled thereto under the provisions of Section 77B, and (2) all Federal taxes, if any, due from the Section 77B Trustee, in respect of the period between December 31, 1937 and the Effective Date, whether or not a claim for such taxes shall have been filed or allowed by the Court.

[fol. 101]

Article IX

Execution of the Plan

As soon as practicable after the confirmation of the Plan by final order of the Court, the Plan shall be consummated by the vesting in the New Company of the business and assets required to be so vested by the provisions of Article III hereof and the issuance of the entire authorized capital stock of the New Company as provided in such Article III. Such final order shall contain all appropriate provisions in aid of the consummation of the Plan and to compel all necessary parties to comply therewith and to make, execute and deliver any instruments necessary to such consummation. All proceedings to be taken and instruments to be executed in the consummation of the Plan, including, without limitation, the certificate of incorporation and the by-laws of the New Company, shall be subject, in the discretion of the Court, to its approval.

Article X

Miscellaneous

Subject to the provisions of Article V hereof, notices under the Plan to Participants and to other parties in interest, if any, may be given by publication once in each week for two successive weeks in a daily newspaper of general circulation in the City of New York.

The statements and figures contained in the Plan and in the Introductory Statement preceding the Plan have been derived from sources believed to be reliable, but none of them is to be construed as a warranty or representation.

[fol. 102] In respect of any action taken to carry out any provision of the Plan and involving a legal question, the directors, officers, employees and agents of the New Company shall be protected, in the absence of a showing of bad faith, in relying upon the advice of its counsel.

No portion of any of the headings to the numbered Articles or paragraphs of the Plan nor any footnote therein shall be a part of the Plan or affect the meaning of any of the provisions thereof.

Dated, April 12, 1938.

Reconstruction Finance Corporation, by Jerome Thralls, Special Representative.

[fol. 103] Exhibit "E" Annexed to Affidavit of William T. Cowin (continued)

United States District Court, Eastern District of New York

In Consolidated Proceedings for Reorganization Under Section 77B of the Bankruptcy Act

Nos. 27496 and 27028

In the Matter of The Prudence Company, Inc., Debtor

In the Matter of the General Plan of Reorganization Proposed by Reconstruction Finance Corporation

This Court having heretofore entered an order, dated August 16, 1935, ordering, adjudging and decreeing as to the manner, among other things, in which claims and inter-

ests of creditors in this proceeding should be filed or evidenced for the purposes therein set forth, including participation in any plan of reorganization which might be confirmed herein; and

Reconstruction Finance Corporation (hereinafter called the RFC) having heretofore filed its petition, verified April 12, 1938, proposing a Plan of Reorganization for the Debtor herein, dated April 12, 1938 (hereinafter called the Plan), and this Court by order to show cause dated April 13, 1938, having directed that the parties and interveners herein and all other persons interested as creditors, stockholders, or [fol. 104] otherwise, and the Section 77B Trustees of the Debtor, show cause at a term of this Court on April 21, 1938, why an order should not be made adjudging the Plan to have been duly proposed, classifying the creditors as therein set forth, adjudging the Plan to be fair, equitable non-discriminatory and feasible and to comply with Section 77B of the Bankruptcy Act, and confirming the Plan; and numerous sessions of the hearing on said petition and order to show cause having been had; and such hearing having been adjourned from time to time by written order of this Court or by orders made in open court; and

The RFC having heretofore proposed certain amendments to the Plan, under date of June 17, 1938, and July 22, 1938, respectively, and this Court, by order dated August 3, 1938, having adjudged, among other things, that the Plan, amended as so proposed by the RFC, was fair and equitable and did not discriminate unfairly in favor of any class of creditors or stockholders and was feasible; and

The RFC having filed its further petition, verified May 5, 1939 (hereinafter sometimes referred to as the Petition for Confirmation), and this Court, by order to show cause dated May 5, 1939, having duly directed that cause be shown at a term of this Court on May 19, 1939, why an order should not be made, as contemplated by the Petition for Confirmation, which shall, among other things, (a) provide how and to whom distributions shall be made under the amended Plan; (b) amend, to the extent required to give effect to such pro- [fol. 105] visions, the previous orders of this Court herein, including the aforesaid order dated August 16, 1935; (c) approve all amendments proposed by the RFC to the Plan, including those proposed in the Petition for Confirmation; (d) confirm the Plan as amended; and (e) direct the Section 77B Trustee of the Debtor to vest forthwith in the New

Company provided for in the amended Plan the assets and business thereby required to be so vested, free and clear, except as provided in the amended Plan, of all claims and interests of the Debtor, its stockholders and creditors, and others, and further, to transfer to such New Company, subject to all then existing equities and rights of third parties therein, all assets held by said Section 77B Trustee for the account of others; and why such other, further and different relief should not be granted in the premises as may be just and proper; and

A hearing on said petition and order to show cause dated May 5, 1939, having been had on May 19, 1939, and an adjourned session of such hearing having been had on May 26, 1939, and the RFC at such hearing and adjourned session having proposed certain further amendments to the amended Plan under date of May 19, 1939, and May 26, 1939, respectively; and

The Section 77B Trustee herein having submitted and filed in this proceeding his own affidavit and the affidavit of Ira K. Balsam, both dated May 19, 1939, and the supplemental affidavit of Ira K. Balsam, dated May 26, 1939, respecting claims allowed herein, and the requisite acceptance in writing of the amended Plan having been so filed, and [fol. 106] due proof having been submitted as to the performance of all other conditions precedent to confirmation of the amended Plan;

Now, upon said order of August 16, 1935, and upon said petitions and orders to show cause, together with proof of due publication, service and mailing of notice thereof as herein provided, and upon the Plan, the aforesaid acceptance thereof, and all proceedings heretofore had herein, it is

Ordered, adjudged and decreed, and this Court does find, as follows:

1. By an order entered herein, dated April 22, 1938, this Court adjudged the Plan duly proposed.

2. By an order entered herein, dated April 25, 1938, this Court adjudged the Debtor to be insolvent. No class of stockholders of the Debtor is affected by the Plan and the Plan properly makes no provision for any such stockholders.

3. By an order entered herein, dated May 3, 1938, this Court directed (a) that any party in interest desiring to

make objections to, or propose changes in or modifications of, the Plan, might file such objections or such proposed changes or modifications in writing on or before May 27, 1938 (which time was thereafter extended); (b) that the hearing on the Plan be adjourned until June 10, 1938, at which time such objections on proposed changes or modifications should be considered; (c) that the Section 77B Trustees of the Debtor publish notice of the hearing of June 10, 1938, and of the opportunity to file such objections and pro- [fol. 107] posals; and (d) that a copy of the Plan and an appropriate form of acceptance, together with a copy of such published notice, be mailed to creditors not later than May 13, 1938. Notice was published as directed, and copies of the Plan and of the published notice, and a form of acceptance, were duly mailed to creditors on or before May 13, 1938.

4. Objections to and proposed changes in and modifications of the Plan were filed herein, and were considered on June 10, 1938, and at adjourned sessions of the hearing on the Plan. Amendments to the Plan were offered by the RFC in proposals dated June 17, 1938, and July 22, 1938, respectively, and such proposals were considered at adjourned sessions of the hearing on the Plan. Copies of the RFC's proposed amendments were served on the parties and interveners herein prior to such adjourned sessions, and arguments of counsel thereon were heard. None of the RFC's amendments was or is materially adverse to the interest of any creditor other than the RFC.

5. By order of this Court dated August 3, 1938, it was adjudged (a) that the Plan, amended as proposed by the RFC as aforesaid, was fair and equitable and that it did not discriminate unfairly in favor of any class of creditors or stockholders and that it was feasible; (b) that the amended Plan complied with the provisions of subdivision (b) of Section 77B of the Bankruptcy Act; (c) that the Debtor was not a utility, and it was therefore unnecessary to comply with the provisions of subdivision (e), clause [fol. 108] (2), of Section 77B; and (d) that for the purposes of the amended Plan and its acceptance, creditors of the Debtor whose claims would be affected thereby should be classified as follows: (1) the United States of America; (2) creditors who came within the definition of Secured Participants as set out in Article I of the amended Plan; and (3)

all other creditors whose claims would be affected by the amended Plan. The RFC is an Unsecured Participant as defined in the amended Plan.

6. In its Petition for Confirmation and at the hearing thereon held May 19, 1939, and at the adjourned session thereof held May 26, 1939, the RFC proposed further amendments to the amended Plan. None of such amendments is materially adverse to the interest of any creditor. Copies of this Court's order to show cause, dated May 5, 1939, issued in respect of such Petition, together with copies of all papers thereto annexed, were duly served, and notices in the form therein set forth were duly published and mailed, all as in said order provided.

7. All provisions of such proposed further amendments with respect to distributions under the amended Plan (including, but without limitations, the proposed further amendments of paragraphs 2 and 3 of Article IV) are hereby adopted by this Court with the same force and effect as though set forth in detail in this order; and all provisions (including, but without limitation, all provisions as to how claims and interests should be evidenced for the purpose of participating in any plan of reorganization in this proceeding) contained in the order of this Court dated [fol. 109] August 16, 1935, or in any other order heretofore entered in this proceeding, are hereby amended to the extent required to give effect to the foregoing. The assignment, on or after February 1, 1935 and prior to the Effective Date of the amended Plan, of a bond or of a mortgage participation certificate issued by Prudence-Bonds Corporation and guaranteed by the Debtor (or of an instrument representing a beneficial interest therein, such as, but not necessarily limited to, a Trustee's certificate) shall be deemed, for all purposes of any plan of reorganization herein, to have effected an assignment of the assignor's guarantee claim against the Debtor (whether or not an instrument evidencing the assignment of such claim has been filed with the Section 77B Trustee) unless the assignor reserved to himself the rights against the Debtor based upon the Debtor's guarantee of such bond or certificate; provided, however, that unless such assignor, by proof filed with the Clerk of this Court on or before July 15, 1939, establishes to the satisfaction of this Court as evidenced by an adjudication, upon a hearing after such notice to the current holder of

such bond or certificate and to the custodian of the register of the particular issue or series as this Court may direct, that such a reservation was made, it shall be conclusively presumed that no such reservation was made.

8. By its aforesaid order dated August 16, 1935, this Court decreed that for the purpose of accepting or consenting to any plan of reorganization, claims and interests should be evidenced by the filing and allowance thereof in [fol. 110] the manner therein set forth. Paragraph 9 of said order provided among other things that duly filed claims should be deemed finally allowed unless objections were interposed prior to December 1, 1935. The time permitted for interposing such objections was thereafter variously extended, but it has now expired.

9. The aggregate amount of claims which have been allowed herein and remain unpaid is $133,723,298.95, consisting of the following, as more particularly set forth in the affidavits of Ira K. Balsam dated May 19, 1939, and May 26, 1939, respectively, hereinabove referred to:

(a) Claims in respect of the guarantee by the Debtor of bonds issued by Prudence-Bonds Corporation, in the principal amount of such bonds outstanding as of February 1, 1935 (except such bonds as were owned by the Debtor at any time on or after February 1, 1935 and prior to said Effective Date), together with interest thereon due and unpaid as of February 1, 1935. The aggregate amount of such allowed claims is $58,833,179.79, consisting of $54,072,645.00 in respect of principal and $4,760,534.79 in respect of interest.

(b) Claims in respect of the guarantee by the Debtor of certificates issued by Prudence-Bonds Corporation, in the principal amount of such certificates outstanding as of February 1, 1935 (except such certificates as were owned by the Debtor at any time on or after February 1, 1935 and prior to said Effective Date) together with interest thereon due and unpaid as of February 1, 1935; [fol. 111] provided, however, that all claims in respect of certificates of the so-called 1111 Park Avenue, Park Place Dodge, 100 West 55th Street, Blind Brook, Wortheo and Dryden issues have been discharged by the payment thereof or by releases contained in the respective plans of reorganization of such certificate is-

sues. The aggregate amount of such allowed claims is $50,857,852.86, consisting of $47,690,401.13 in respect of principal and $3,167,451.73 in respect of interest;

(c) Claims in respect of the guarantee by the Debtor of single mortgages (other than mortgages securing bonds or certificates issued by Prudence-Bonds Corporation) in the aggregate amount of $12,523,461.00;

(d) The RFC's claim, allowed for voting purposes in the aggregate amount of $11,357,577.45;

(e) Other claims in the aggregate amount of $151,227.85.

All claims and interests founded upon bonds or mortgage participation certificates issued by the Debtor have been discharged by reason of separate reorganizations thereof consummated in this proceeding.

10. The provisions of Sections 198, 224 and 267 of Chapter X of the Bankruptcy Act, as amended by the Act of Congress of June 22, 1938, are deemed applicable to this proceeding.

[fol. 112] 11. All amendments proposed by the RFC as aforesaid are hereby approved and declared effective by this Court, and Exhibit A hereto attached constitutes the amended Plan.

12. The amended Plan has been accepted in writing and such acceptance has been filed in this proceeding by or on behalf of creditors of the Debtor holding at least two-thirds in amount of the claims of each class of creditors whose claims have been allowed and would be affected by the Plan. Creditors of the Debtor as classified by the order of this Court, dated August 3, 1938, for the purposes of the amended Plan and its acceptance, and acceptances of the amended Plan by such creditors, are as follows:

	Allowed Claims	*Acceptances*	*%*
1. United States of America	$ 400,000.00	$ 400,000.00	100
2. Secured Participants	$122,214,493.65	$85,352,494.45	69.8
3. Other	$ 11,508,805.30	$11,359,187.24	98.7

No acceptance of the amended Plan by or on behalf of stockholders of the Debtor of any class is requisite.

13. There has been filed in these proceedings a statement, verified in a manner hereby approved, showing what contracts of the Debtor are executory in whole or in part and what unexpired leases have been rejected and surrendered.

14. By reason of the number of outstanding securities of the Debtor, or guaranteed by the Debtor, and the extent of the public dealing therein, it would be impractical to prepare [fol. 113] a statement showing what, if any, claims and shares of stock have been purchased or transferred by those accepting the amended Plan after the commencement or in contemplation of this proceeding, and the circumstances of such purchase or transfer, and accordingly it is hereby directed that such a statement be not filed.

15. By an order dated April 21, 1939, this Court, among other things, approved a proposed certificate of incorporation of and by-laws for Prudence Realization Corporation, the New Company contemplated by the amended Plan. Pursuant to said order, the New Company was thereupon duly organized under the Stock Corporation Law of the State of New York, with a certificate of incorporation and by-laws in the form approved as aforesaid. By said order this Court found that the persons named as directors in such certificate of incorporation had been duly designated as such, pursuant to the applicable provisions of the amended Plan, that the identity, qualifications and affiliations of such persons had been fully disclosed, and that the appointment of such persons as such directors was equitable, compatible with the interests of the creditors and stockholders and consistent with public policy. At the instance of the directors, the identity, qualifications and affiliations of the persons who are to be officers of the New Company, upon consummation of the amended Plan, together with the aggregate compensation to be paid to the principal officers of the New Company during the first year following the Effective Date of the amended Plan, have been fully disclosed by an affidavit of the Section 77B Trustee dated May 25, 1939. The appoint- [fol. 114] ment of such persons to such offices is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy, and such aggregate compensation is approved as fair and reasonable.

16. After hearing all objections which have been made to the amended Plan and its confirmation, this Court is satisfied that:

(a) the Plan and all amendments thereto approved by this Court have been duly proposed and considered at a hearing or hearings duly noticed for their consideration, all in conformity with subdivision (d) of Section 77B;

(b) all creditors and stockholders of the Debtor and all other interested persons have had a fair opportunity to make objections to the amended Plan and its confirmation and to be heard thereon;

(c) the amended Plan is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders, and is feasible;

(d) the amended Plan complies with, and has been accepted as required by, all applicable provisions of laws;

(e) the provisions of subdivision (e), clause (2), of Section 77B are not applicable;

(f) all amounts to be paid by the Debtor or by any corporation or corporations acquiring the Debtor's assets, and all amounts to be paid to committees or re- [fol. 115] organization managers, whether or not by the Debtor or any such corporation, for services or expenses incident to the reorganization, have been fully disclosed and are reasonable, or are to be subject to the approval of the judge in charge of the proceeding;

(g) the offer of the Plan and all amendments thereto approved by this Court, and the acceptance thereof, have been made in good faith and have not been made or procured by any means or promises forbidden by the Bankruptcy Act;

(h) the Debtor, and every other corporation issuing securities or acquiring property under the amended Plan, are authorized by their respective charters or by applicable State or Federal laws, upon confirmation of the amended Plan, to take all action necessary to carry out the amended Plan;

(i) the identity, qualifications and affiliations of the persons who are to be directors or officers of the New Company, upon consummation of the amended Plan, have been fully disclosed, and the appointment of such persons to such offices is equitable, compatible with the interests of the creditors and stockholders and consistent with public policy; and

(j) all other conditions precedent, if any, to the confirmation of the amended Plan, under any applicable provision of law, have been complied with.

[fol. 116] 17. The amended Plan is hereby in all respects approved and finally confirmed.

18. The Section 77B Trustee of the Debtor is hereby directed, solely in consideration for the issuance to such Trustee acting on behalf of the Debtor of all the authorized capital stock of the New Company, forthwith (a) to execute and deliver to the New Company an assignment substantially in the form annexed as Exhibit C to the Petition for Confirmation, and (b) to deliver and surrender to the New Company possession of and control over the assets and business to which such assignment relates. The date of the execution by such Trustee of such assignment shall be the Effective Date of the amended Plan. The Debtor is hereby ordered to join in the execution of such assignment, and the New Company is hereby ordered to execute the acceptance and undertaking set forth at the foot thereof. All depositaries having funds on deposit credited to the Debtor's estate are hereby directed to transfer such accounts to the New Company upon the written request of the Section 77B Trustee; the signature of the Clerk of this Court shall not be required to effect the transfer of such accounts.

As soon as practicable, the Section 77B Trustee shall execute and deliver to the New Company such further instruments of assignment, transfer, grant and conveyance (including, without limitation, deeds of real estate, assignments of mortgages, endorsements and powers of attorney) and shall effect such manual deliveries to the New Company, as the New Company reasonably may require to further [fol. 117] assure the vesting in the New Company, as provided in Article III of the amended Plan, of the assets and business thereby required to be so vested; and the Debtor

is hereby ordered to join in the execution of such instruments upon the request of the New Company.

Each bond and certificate issued by Prudence-Bonds Corporation and any other instrument included among such assets which was guaranteed by the Debtor shall be stamped, prior to delivery to the New Company, with a legend to the effect that such guarantee has been cancelled.

Forthwith upon the issuance by the New Company of its stock as hereinabove provided, the Section 77B Trustee shall assign and transfer one share of Class A stock to each of the five Class A directors and one share of Class B stock to each of the two Class B directors of the New Company, whereupon, as provided in Article III of the amended Plan, each such director shall enter into a written agreement substantially in the form approved by the aforesaid order of this Court dated April 21, 1939. The Debtor is hereby ordered to join in the execution of each such assignment and transfer.

19. The assets and business to be vested in the New Company shall be free and clear of all claims and interests of the Debtor, its stockholders and creditors, and others, except the following which shall remain outstanding:

(a) claims for amounts due as taxes to the United States of America and the State of New York, and the items provided for in Article VIII of the amended Plan,

[fol. 118] (b) finally allowed claims against the property of the Debtor in respect of which the Debtor is not personally liable, and

(c) finally allowed claims of the character which shall entitle the holders thereof to be deemed Participants as defined in Article I of the amended Plan.

There are no claims or interests having priority except the claims and items referred to in the foregoing subdivision (a).

The claims referred to in the foregoing subdivision (b) shall be payable only out of the property against which they are claims.

The claims and items referred to in the foregoing subdivisions (a) and (c) shall be paid by the New Company, but only as follows:

The claims and the items referred to in the foregoing subdivision (a) shall be paid in full in due course out of the New Company's assets. Such claims and items shall not constitute liens upon such assets, but shall have priority over all distributions to Participants under the amended Plan and over all liabilities incurred by the New Company; and the New Company shall be entitled to sell all or any part of such assets free and clear of any charge in respect of such claims and items.

The claims referred to in the foregoing subdivision (c) shall not constitute liens upon the New Company's assets, and the New Company shall be entitled to sell all or any part of such assets free and clear of any charge in respect of such claims; provided, however, that nothing herein contained shall be deemed to affect the lien, if any, to which any part [fol. 119] of such assets was subject, immediately prior to the vesting thereof in the New Company, in respect of any such claim. The claims referred to in such subdivision (c) shall be payable, without interest, only as provided in Article IV of the amended Plan and only to the extent that the New Company's assets shall be sufficient to pay them, after reserving from such assets $70 for the New Company's capital and $70 for its surplus, and after payment of or provision for (i) the amounts and items referred to in the foregoing subdivision (a), and (ii) such liabilities as may be incurred by the New Company. Such surplus shall be available to pay for stock which may be purchased by the New Company under the options provided for in Article III of the amended Plan.

20. The Section 77B Trustee of the Debtor is hereby further directed to transfer to the New Company forthwith, subject to all then existing equities and rights of third parties therein, all assets held by said Section 77B Trustee for the account of others, or held by said Section 77B Trustee in any agency or other segregated account pending settlement or determination of equities or rights asserted by others. The moneys in the bank accounts denominated "The Estate of The Prudence Company, Inc., Debtor, Nos. 27496 & 27628, Servicing Fees Reserve Account," in Brooklyn Trust Company, 177 Montague Street, Brooklyn, N. Y., Kings County Trust Company, 372 Fulton Street, Brooklyn, N. Y., Lawyers Trust Company, 185 Montague Street, Brooklyn, N. Y., and The National City Bank of New York,

Court Street at Montague Street, Brooklyn, N. Y., may be [fol. 120] dealt with by the New Company, without further order of this Court, upon due settlement or determination of the New Company's interest therein, provided, however, that, pending such settlement or determination, the moneys in such accounts shall be retained in a segregated agency account or accounts; and the order of this Court dated August 16, 1935, under which such moneys have heretofore been held by the Section 77B Trustee, and the order of this Court dated February 1, 1935, as amended by said order of August 16, 1935, are hereby amended to the extent required to give effect to the foregoing. Upon receipt of a certified copy of this order, the banks named herein shall take such steps as may be necessary or appropriate to effectuate the transfer of such accounts to the New Company.

21. The New Company is hereby directed to pay in full in due course all Federal taxes, if any, due from the Section 77B Trustee, in respect of the period between December 31, 1937 and the Effective Date of the amended Plan, whether or not a claim for such taxes shall have been filed or allowed by this Court.

22. On and after the Effective Date, the RFC's claim shall stand allowed in the amount of $11,347,775.50, without prejudice to such right as the RFC may have, under the provisions of Section 77B(c)(9), or other applicable provisions of law, to be compensated for services rendered and to be reimbursed for expenses incurred in connection with the proceedings and the amended Plan.

[fol. 121] 23. All causes of action or rights against present or former officers or directors of the Debtor, and against other parties arising out of or relating to the transactions giving rise to such causes of action or rights, including those asserted in the suits instituted in the Supreme Court of the State of New York, County of New York, by the Section 77B Trustees, captioned Stephen Callaghan, et al., Plaintiffs v. Frank Bailey, et al., Defendants, and by Julia Regan, et al., captioned Julia Regan, et al., Plaintiffs v. The Prudence Company, Inc., et al., Defendants, shall survive the confirmation and consummation of the amended Plan and shall not be deemed to have been abandoned.

24. The provisions of the amended Plan and of this order shall be binding upon (a) the Debtor, (b) all stockholders of

the Debtor, (c) all creditors of the Debtor, secured or unsecured, whether or not affected by the amended Plan, and whether or not their claims or interests shall have been filed and, if filed, whether or not scheduled, allowed or allowable, including creditors who have not, as well as those who have, accepted the amended Plan, and (d) the New Company.

25. This court reserves jurisdiction:

(a) to take all such further action as may be required in aid of the consummation of the amended Plan, including, but not limited to, the giving of such directions, authorizations or approvals as this Court may determine in regard to instruments of transfer and conveyance of the property dealt with by the amended Plan; and to take all action contemplated by the pro- [fol. 122] visions of Article V of the amended Plan to be taken by this Court with respect to the valuations therein provided for;

(b) To approve duly proposed changes in and modifications of the amended Plan, after hearing duly noticed, subject to the right of any creditor who shall previously have accepted the amended Plan to withdraw his acceptance, within a period to be fixed by the judge in charge of the proceeding and after such notice as such judge may direct, if, in the opinion of such judge, the change or modification will be materially adverse to the interest of such creditor; provided, however, that the amended Plan as changed or modified shall comply with all applicable provisions of law and shall have been or shall thereafter be duly accepted;

(c) from time to time to make such orders, adjudications and decrees respecting claims or the assignment or registration thereof or distributions thereon, including, without limitation, adjudications of the character contemplated by paragraph 7 hereof, and respecting the assets, equities and rights referred to in paragraph 20 hereof, all as justice may require;

(d) to allow and direct the payment of all expenses, costs and allowances provided for in Article VIII of the amended Plan;

(e) upon the termination of the proceeding, to enter a final decree discharging Stephen Callaghan, John M. McGrath and William T. Cowin as Trustees of the [fol. 123] Debtor's estate (the first two named having heretofore resigned), making such provisions as may be equitable, by way of injunction or otherwise, and closing the case; to discharge the Debtor from its debts and liabilities, and to terminate and end all rights and interests of its stockholders, except as provided in the amended Plan; and

(f) generally to determine any and all matters pertaining to this proceeding or to the amended Plan and not determined heretofore or by this order.

26. The Section 77B Trustee is directed to publish, on or before June 3, 1939, in the New York Times and Brooklyn Daily Eagle, newspapers of general circulation in the City of New York, a notice of the entry of this order in substantially the following form:

In the United States District Court, for the Eastern District of New York; In the Matter of The Prudence Company, Inc., Debtor; consolidated proceedings for the reorganization of a corporation under Section 77B of the National Bankruptcy Act, Index Nos. 27496 and 27028;

To all creditors and stockholders of The Prudence Company, Inc., and all other persons in any wise interested in the above entitled proceeding:

Take notice that an order dated May 26, 1939, has been entered herein which, among other things, (a) provides how and to whom distributions shall be made under the general Plan of Reorganization of the said Debtor, dated April 12, 1938, proposed by Reconstruction Finance Corporation, including a provision (more fully set forth in the amended Plan) to the effect, in the case of each claim founded on the Debtor's guarantee of a bond or certificate, that such distributions shall be made to the holder of such bond or certificate unless a person who disposed of such bond or certificate between February 1, 1935 and the Effective Date of the amended Plan, by proof filed with the Clerk of this Court on or before July 15, 1939, establishes to the satisfaction of the Court that he reserved to himself

the rights against the Debtor based on the Debtor's guarantee thereof, in which case such distributions shall be made to such person; (b) amends, to the extent required to give effect to such provisions, the previous orders of the Court herein, including the order dated August 16, 1935, relative, among other things, to the manner in which claims and interests of creditors in this proceeding should be filed or evidenced for the purposes therein set forth; (c) approves all amendments proposed by Reconstruction Finance Corporation to said Plan, including those proposed by it in its petition dated May 5, 1939, and at the hearing thereon, and the adjourned session thereof; (d) confirms the Plan as amended; and (e) directs the Section 77B Trustee of the Debtor to vest forthwith in the New Company provided for in the amended Plan the assets and business thereby required to be so vested, free and clear, except as provided in the amended Plan, of all [fol. 125] claims and interests of the Debtor, its stockholders and creditors, and others, and further, to transfer to such New Company, subject to all then existing equities and rights of third parties therein, all assets held by said Section 77B Trustee for the account of others, or held by said Section 77B Trustee in any agency or other segregated account pending settlement or determination of equities or rights asserted by others.

Copies of said order and copies of the amended Plan as confirmed by the Court may be obtained upon request at the office of the Section 77B Trustee of the Debtor, 331 Madison Avenue, New York, N. Y., or at the office of the solicitors for Reconstruction Finance Corporation, Messrs. Root, Clark, Buckner & Ballantine, 31 Nassau Street, New York, N. Y.

William T. Cowin, Section 77B Trustee of The Prudence Company, Inc.

and the Section 77B Trustee is further directed to mail, on or before June 3, 1939, a copy of said notice to all persons who have duly filed proofs of claim herein (or their assignees on the records of such Trustee) unless such claims have been heretofore discharged or disposed of otherwise than by their allowance. The cost of such publication and

mailing shall be paid out of the funds in the Debtor's estate, and promptly upon completion thereof due proof of such publication and mailing shall be filed with the Clerk of this Court by the Section 77B Trustee. No failure to comply with the provisions of this paragraph 26 shall in any wise affect the effectiveness of the other provisions of this order or of the amended Plan.

[fol. 126] 27. The hearing on the above mentioned petition of April 12, 1938, the order to show cause dated April 13, 1938, the amended Plan, the Petition for Confirmation, and the order to show cause dated May 5, 1939, is hereby adjourned to June 23, 1939.

Dated, May 26, 1939.

Grover M. Moscowitz, U. S. D. J.

In Supreme Court of New York, County of New York

[Same title]

Affidavit of Irving L. Schanzer, Read in Support of Motion

State of New York,
County of New York, ss:

Irving L. Schanzer, being duly sworn, deposes and says:

I am the attorney for Prudence Realization Corporation, one of the defendants herein. I am fully familiar with the facts and circumstances involved in the above entitled actions and have been in active charge of this litigation.

I have read the affidavit of William T. Cowin, duly sworn to the 5th day of June, 1942, made in support of the motion by defendant Prudence Realization Corporation for sum-[fol. 127] mary judgment. The statements therein stated to have been made upon advice of counsel were made pursuant to my opinion rendered to defendant Prudence Realization Corporation as its counsel.

I am of the opinion and believe that the evidentiary facts set forth in the said affidavit of William T. Cowin and the documents attached thereto as exhibits establish that the defenses pleaded by the defendant Prudence Realization Corporation are sufficient to defeat the plaintiffs herein;

that the complaints do not allege a meritorious cause of action, and that said defendant Prudence Realization Corporation is entitled to affirmative relief in its favor as prayed for in its answers interposed herein. There are no triable issues of fact involved in these actions.

Based upon my knowledge of the issues involved in the decision of the United States Supreme Court in Prudence Realization Corporation v. Geist, 62 S. Ct. 978, I am of the opinion that the said decision determines that the legal issue involved in the present actions is one of federal law as to which the decisions of the federal courts are controlling. Based upon my examination of the applicable decisions of the New York courts, I am of the opinion that such decision is binding and controlling upon this court in determining the legal questions here involved and further, that independently of consideration of the decision of the United States Supreme Court in the above cited case, the defendant Prudence Realization Corporation is entitled to affirmative relief as prayed for in its answers under the pertinent decisions of the courts of the State of New York.

Irving L. Schanzer.

(Sworn to June 5, 1942.)

[fol.128] In Supreme Court of New York, County of New York

[Same title]

Affidavit of Joseph W. Ferris, George L. Long and Henry Leifert, Read in Opposition to Motion

State of New York,
County of New York, ss:

Joseph W. Ferris, George L. Long and Henry Leifert, being duly and severally sworn, depose and say:

That they are the plaintiffs in the above entitled action.

That they are Trustees of the certificate mortgage issued by The Prudence Company, Inc. covering premises No. 307 West 36th Street, Borough of Manhattan, City and State of New York.

That they were appointed, as alleged in the complaint, pursuant to a Plan of Reorganization promulgated and

adopted in a proceeding in the United States District Court for the Eastern District of New York. Reference has been made to the said Plan of Reorganization and to the orders amending and confirming the said Plan, and there will be submitted upon the hearing of this motion the Plan of Reorganization referred to in the eleventh paragraph of the complaint and bearing date the 1st day of November, 1937, together with the order bearing date the 14th day of June, 1938 which amended the said Plan of Reorganization and [fol. 129] confirmed said Plan as amended. The amendments made to the Plan were annexed to the said order of June 14, 1938.

That while the Plan of Reorganization, relating to the mortgage on 307 West 36th Street (Burnside) First Mortgage Participation Certificates, was promulgated and approved in the proceeding entitled "In the Matter of Amalgamated Properties, Inc. In the Matter of a Plan of Reorganization of the Debtor in respect of 307 West 36th Street (Burnside) First Mortgage Participation Certificates. In Proceedings for the Reorganization of a Corporation under Section 77B of the Bankruptcy Act. No. 34791," the Plan of Reorganization dealt solely with premises No. 307 West 36th Street, New York City, and had no reference whatsoever to any other property of the debtor, Amalgamated Properties, Inc.

That the Plan of Reorganization as originally proposed and before it was amended, provided that all certificates were to be on a parity. The amendment which was made and which was approved by the court in confirmation of the Plan by its order dated the 14th day of June, 1938 reserved the question for future determination. (See Part VI, Section 4, Plan dated November 1, 1937.)

That the issue involved in this case is whether the certificates held by the defendant, The Prudence Realization Corporation, are on a parity or whether they are subordinate to the certificates publicly held. That this action was commenced by the plaintiffs for the purpose of having a determination made of that issue pursuant to the requirement of the Plan of Reorganization as amended.

[fol. 130] That the mortgage, as alleged in the complaint, was $1,200,000.00 and was by its terms due on the 1st day of July, 1932 and certificates were originally sold to the full extent of the mortgage to various persons. Under the

terms of the mortgage, amortization of principal was to be paid as follows:

$12,000.00	July 1, 1928
12,000.00	January 1, 1929
12,000.00	July 1, 1929
12,000.00	January 1, 1930
12,000.00	July 1, 1930
12,000.00	January 1, 1931
12,000.00	July 1, 1931
12,000.00	January 1, 1932

and the balance of the mortgage was to be paid on July 1st, 1932. The mortgagor paid $84,000.00 and defaulted on the amortization payment due January 1, 1932 and certificates amounting to $84,000.00 were retired reducing the amount of the mortgage to $1,016,000.00.

That all the certificates acquired by The Prudence Company, Inc. were, by their terms, due and payable on July 1st, 1932. The dates of acquisition of various certificates are set forth in defendant's Exhibit "D". At the time of their acquisition the mortgagor was in default under the terms of the mortgage. With respect to the acquisition plaintiffs allege in their complaint the following:

> "Tenth: Upon information and belief some of said certificates were repurchased or exchanged for other investments pursuant to agreement of guaranty and because said certificates were by their terms due and payable."

[fol. 131] That in support of this motion, the defendant, Prudence Realization Corporation, has submitted the affidavit of William T. Cowin, President of Prudence Realization Corporation, who stated that these certificates were purchased in the regular course of business. Mr. Cowin has no personal knowledge of how the certificates were acquired. He was not connected with The Prudence Company, Inc. in 1932 and in fact had no connection with that Company so far as your deponents know, until he was appointed one of the Trustees of The Prudence Company, Inc. in the bankruptcy proceeding. Your deponents likewise have no personal knowledge of the facts and circumstances surrounding the acquisition of the certificates but they have been informed and verily believe that these cer-

tificates were not acquired in the regular course of business and as an investment but rather were acquired by reason of the fact that The Prudence Company, Inc. was the guarantor.

That your deponents have been informed by their counsel and verily believe it is not necessary for them to submit testimony of the persons who have knowledge, but that such testimony should be submitted upon a trial so that the Court may make a proper determination from all the facts and surrounding circumstances whether or not these certificates were acquired pursuant to the agreement of guaranty. The statement made by Mr. Cowin has no probative value and for that reason counsel has informed your deponents and they verily believe it is not necessary for them to submit the evidence upon which they rely at this time.

[fol. 132] That with respect to the effect of the Plan of Reorganization of The Prudence Company, Inc. that is the question of law to be determined through the Plan and the orders entered thereon and all the surrounding circumstances and not upon the opinion of the moving party or its counsel and it would serve no useful purpose in this affidavit to consider in detail the proceedings nor the provisions of the Plan itself.

That the second cause of action in the complaint seeks to compel the defendant, Prudence Realization Corporation, to account for monies which it has in its possession. The Trustees of The Prudence Company, Inc., appointed by the Federal Court, did not make any interest distribution to The Prudence Company, Inc. upon its certificates. They deposited the distribution to which such certificates would be entitled into an agency or segregated account, subject to a decision as to whether The Prudence Company, Inc. was entitled to share on a parity with publicly held certificates. Under the Plan of Reorganization of The Prudence Company, Inc. and pursuant to the order of confirmation of that Plan, these monies were transferred to the Prudence Realization Corporation, subject to the existing equities and rights of the certificate holders and the persons who represent them. The amount so transferred, your deponents have been informed by Irving L. Schanzer, Esq., attorney for Prudence Realization Corporation, amounts to the sum of $40,102.78, which sum is still in the possession of the defendant, Prudence Realization Corporation.

That your deponents have been informed by counsel and verily believe that the issues involved in this case have not [fol. 133] been concluded by the decision of the Supreme Court of the United States in the Zo-Gale case referred to, nor by the Plan of Reorganization of The Prudence Company, Inc. and your deponents verily believe that the issue here will have to be decided wholly and solely according to the laws of the State of New York.

Wherefore your deponents pray that the motion be denied.

Joseph W. Ferris, George L. Long, Henry Leifert.

(Sworn to June 19, 1942.)

[fol. 134] In Supreme Court of New York, County of New York

[Same title]

Affidavit of Charles H. Kriger, Read in Opposition to Motion

State of New York,
County of Kings, ss.:

Charles H. Kriger, being duly sworn, deposes and says:

That he is attorney for the plaintiffs in the above entitled action.

That annexed hereto and marked plaintiffs' Exhibit "1" is a copy of the Plan of Reorganization dated November 1, 1937 for 307 West 36th Street First Mortgage Participation Certificates.

That annexed hereto and marked plaintiffs' Exhibit "2" is a copy of the order confirming the Plan of Reorganization, dated the 14th day of June, 1938, which said order contains the amendments to the Plan of Reorganization.

That both of these documents are referred to in the affidavit of the plaintiffs herein, dated the 19th day of June, 1942 and are being submitted in opposition to the motion made by defendant, Prudence Realization Corporation.

Charles H. Kriger.

(Sworn to June 23, 1942.)

[fol. 135] EXHIBIT "1" ANNEXED TO AFFIDAVIT OF CHARLES H. KRIGER

Plan of Reorganization

Dated November 1, 1937

for

307 West 36th Street

First Mortgage Participation Certificates

Proposed by Amalgamated Properties, Inc., Debtor, in the proceedings pending in the United States District Court for the Eastern District of New York, for the reorganization of The Prudence Company, Inc., and Amalgamated Properties, Inc., in reorganization under Section 77-B of the Bankruptcy Act (Nos. 27496 and 27028).

Introductory Statement as of November 1, 1937

(Not a part of or affecting the following Plan of Reorganization, but presented solely to explain its background.)

This is a plan of reorganization proposed by Amalgamated Properties, Inc., Debtor, which is in reorganization in proceedings under Section 77B of the Bankruptcy Act in the United States District Court for the Eastern District [fol. 136] of New York. The petition of Amalgamated Properties, Inc., was approved on March 17, 1936, and it was continued in possession of its property and estate. Amalgamated Properties, Inc., is a New York corporation, the entire capital stock of which is owned by Stephen Callaghan, John M. McGrath and William T. Cowin, as Trustees of The Prudence Company, Inc., who constitute the entire board of directors and all of its officers.

Amalgamated Properties, Inc., is the owner of premises located at 307 West 36th Street, Borough of Manhattan, City, County and State of New York. The said premises are improved with a brick, stone and steel fireproof eighteen-story loft building, containing 169,634 square feet of rentable space, and is situated on a plot approximately 187 feet by 77 feet, having an area of approximately 14,888 square feet.

The premises are subject to a first mortgage now in the principal sum of $1,016,000, held by City Bank Farmers Trust Company, as Successor Depositary, under the terms of a Deposit Agreement dated June 25, 1927, between Prudence-Bond Corporation and The Bank of America (succeeded by City Bank Farmers Trust Company). The first mortgage was made by Burnside Improvement Co., Inc., the then owner of the premises, to 135 Broadway Holding Corporation and was thereafter, by mesne instruments of assignment, assigned on June 20, 1927, to The Prudence Company, Inc., which entered into an agreement with Burnside Improvement Co., Inc., providing that the mortgage debt then in the sum of $1,100,000 was to be paid in instalments of amortization in the sum of $12,000 each and interest at the rate of 6% per annum, payable semi-annually [fol. 137] on the 1st days of January and July until July 1, 1932, when the balance of said principal indebtedness was due and payable. On August 3, 1927, The Prudence Company, Inc., assigned the said mortgage to Prudence-Bonds Corporation. On August 3, 1927, Prudence-Bonds Corporation assigned said mortgage to The Bank of America, as Depositary, subject to the terms and conditions of said Deposit Agreement. Simultaneously, The Prudence Company, Inc., caused to be issued certificates of participation in said first mortgage in the principal sum of $1,100,000, commonly known as the 307 West 36th Street Issue. Certificates of participation in said certificate issue were issued by and in the name of Prudence-Bonds Corporation and delivered to The Prudence Company, Inc., and by The Prudence Company, Inc., sold to the public with its guaranty of principal and interest at the rate of 5½% per annum, payable semi-annually on the 1st days of January and July. (The ½ of 1% differential between the interest rate on the certificates and the interest rate on the mortgage was reserved to The Prudence Company, Inc., as its fee for its guaranty and its "servicing" of the first mortgage and the certificate issue as agent of the certificate holders.) There are now outstanding certificates in the aggregate principal amount of $1,013,500, of which The Prudence Company, Inc., owns $431,212.86 in principal amount. Certificates amounting to the sum of $2,500 were sold to the public and subsequently repurchased and cancelled. No certificates in place thereof have been issued, and The Prudence Com-

pany, Inc., is entitled to receive credit from the Depositary for that amount.

[fol. 138] The premises were conveyed to Amalgamated Properties, Inc., by deed dated June 13, 1932, in consideration of the payment of $3,000, subject to the lien of the first mortgage.

On February 7, 1934, effective as of March 4, 1933, Amalgamated Properties, Inc., executed and delivered to The Prudence Company, Inc., an assignment of rents and mortgagee in possession instrument and the Trustees of The Prudence Company, Inc., are now in possession and control of the premises thereunder.

As of November 1, 1937, the first mortgage was in arrears for the full principal amount of $1,016,000. Interest amounting to $225,261.35 is in arrears. The Trustees of The Prudence Company, Inc., hold cash of $18,857.21, of which amount $2,875 was reserved for real estate taxes coming due April 1, 1938, all prior real estate taxes being fully paid, and the balance of $15,982.21 is reserved for future distribution of interest to certificate holders.

As of November 1, 1937, the certificate holders have been paid interest in full to July 1, 1933, and $4.60 per $100 certificate on account of interest due on and after January 1, 1934. Interest at the rate of $17.40 per $100 certificate, or a total of $176,784, is due them to and including July 1, 1937.

Following is a statement of the operations of the said premises.

[fol. 139]	*Full Calendar Year of 1935*	*Full Calendar Year of 1936*	*Jan. 1, 1937, to Oct. 31, 1937*
Total Revenue	$103,204 26	$107,080 52	$97,943 43
Operating Expenses	41,305 42	45,761 00	36,489 22
Profit from Operations before Real Estate, Taxes, Mortgage Interest or Depreciation	$ 61,898 84	$ 61,319 52	$61,454 21
Real Estate Taxes	35,250 00	33,750 00	28,710 00
Earned as Interest on the Mortgage (before Depreciation)	$ 26,648 84	$ 27,569 52	$32,744 21
Approximate Interest Earned for Period	2 62%	2 71%	3 22%

The occupancy as of October 31, 1937, showed unrented space having an estimated annual rental of $3,950.16, out of the estimated total annual rental for the premises of $120,462.

The purpose of this Plan is fairly and equitably to protect the interests of the holders of said 307 West 36th Street Certificate Issue by readjustment and modification of the said first mortgage. The reorganization contemplated in this Plan relates only to the premises known as 307 West 36th Street, the personal property therein, the first mortgage thereon and the certificates of participation in the first mortgage.

Part I

Definitions and Miscellaneous Provisions

In this Plan the following terms have the following meanings:

Premises or Mortgaged Property means the premises located at No. 307 West 36th Street, Borough of Man- [fol. 140] hattan, City of New York.

Certificated Bond and Mortgage means the bond and mortgage covering the aforesaid premises made by Burnside Improvement Co., Inc., to 135 Broadway Holding Corporation, title to which is in the name of City Bank Farmers Trust Company, as Depositary.

Modified Bond and Mortgage means the certificated bond and mortgage as extended and modified in accordance with the Plan.

Certificates means certificates of participation issued by Prudence-Bonds Corporation against the said certificated bond and mortgage and guaranteed by The Prudence Company, Inc.

Trustee means the trustee appointed by the Court, to take title to the mortgaged property and the certificated bond and mortgage.

Guaranty means the instrument of guaranty dated August 3, 1927, executed by The Prudence Company, Inc., guaranteeing payment of the certificates.

Depositary means City Bank Farmers Trust Company (successor to The Bank of America).

Court means the United States District Court for the Eastern District of New York or the Judge in charge of these proceedings.

Effective Date means the date the Court may fix as the date on which the Plan is to be consummated.

[fol. 141] Part II

Scope of the Plan

This Plan proposes only to reorganize the certificated bond and mortgage and the certificates. The Plan does not embrace in its scope anything other than the mortgage property, the personal property owned by the Debtor therein, the certificated bond and mortgage, the certificates, and any other money or property to which the certificate holders are entitled. All rights of action against the obligor upon the bond, and against The Prudence Company, Inc., pursuant to its agreement of guaranty dated August 3, 1927, are expressly reserved.

Part III

The Mortgaged Property

On the Effective Date of the Plan, Amalgamated Properties, Inc., shall, by bargain and sale deed, grant, transfer and convey the mortgaged property to a trustee to be named by the Court (hereinafter called the "Trustee"), subject to the certificated mortgage and subject also to unpaid taxes, water rates and assessments, to encroachments, zoning ordinances, restrictions of record, violations, etc., and shall also convey to the Trustee all articles of personal property, and other equipment located on the mortgaged property to which Amalgamated Properties, Inc., now has title. The deed shall provide that there shall be no merger of the certificated mortgages and the fee.

[fol. 142] Part IV

Th Certificated Mortgages

1. The certificate holders hereby revoke and terminate any rights of Prudence-Bonds Corporation and its trustees, The Prudence Company, Inc., and its trustees, and City Bank Farmers Trust Company, as depositary, and anyone claiming any rights to service the certificated bond and mortgage or to perform any acts whatsoever in connection therewith, whether as agent, trustee, or grantee of alleged powers in trust, or substituted grantee of alleged powers in trust, and do hereby make, constitute and appoint the Trustee appointed by the Court in the place and stead of

said corporations and persons. Upon the acceptance by the Trustee of its duties hereunder, Prudence-Bonds Corporation and its trustees, The Prudence Company, Inc., and its trustees, and City Bank Farmers Trust Company, as depositary, and any other individual or individuals or corporation holding any document or property relating to said certificate issue, shall assign and deliver to the Trustee the certificated bond and mortgage, together with all extension and consolidation agreements, policies, assignments of rents, guaranties and other documents relating thereto, and together with any other assets or property which have been deposited or are held as collateral in connection with said certificate issue, together with all cash, property and other assets to which the certificate holders are or would be entitled, except as otherwise provided in this Plan. Thereafter the Trustee shall administer and realize upon said certificated bond and mortgage, assets and properties, pursuant to the terms of a declaration of trust, which shall be [fol. 143] approved by the Court, for the purpose of making distribution of the income and proceeds of said assets to the certificate holders. The declaration of trust shall be filed in the office of the Register of the County of New York, and the Trustee appointed by the Court shall be subject to the jurisdiction of the New York Supreme Court and annually accountable to that Court for its acts and administration during the preceding year. The assignment of the certificated mortgage shall provide that there shall be no merger of the mortgage and the fee.

2. After the Plan has been confirmed, and the certificated bond and mortgage has been assigned to the Trustee, and prior to the conveyance of the mortgaged premises as provided in Part III hereof, the Trustee shall enter into a modification and extension agreement with the owner, Amalgamated Properties, Inc., whereby the certificated bond and mortgage is extended, without recourse or liability to the owner, upon the following terms:

(a) Payment of the principal sum of the certificated bond and mortgage shall be extended for a period of five years from the Effective Date of the Plan. Interest due upon the certificated bond and mortgage prior to the Effective Date of the Plan shall be waived.

(b) The annual gross cash income from the mortgaged property shall be applied as follows:

First, to the payment of the following charges and expenses:

(1) operating and administrative expenses;

[fol. 144] (2) insurance premiums, current real estate, income and other taxes and special assessments chargeable against the Trustee or which are liens on the mortgaged property;

(3) cost of reasonable repairs, renewals, replacements and maintenance;

(4) charges of the Trustee in an amount to be fixed by this Court, not to exceed ¼ of 1% of the principal amount of the certificates per annum;

(5) reasonable legal and accounting expenses necessary for the conduct of the business of the Trustee with respect to the mortgaged premises;

(6) cost of necessary improvements and alterations, whether or not chargeable to capital;

(7) any reorganization expenses which are not paid upon the consummation of the Plan, *but all amounts to be paid on account of compensation and expenses shall be subject to the approval of the Court, and the amount of all such compensation and expenses shall only be such as shall be so approved;*

(8) any unpaid taxes, assessments, water charges and interest and penalties thereon with respect to the mortgaged property which are not paid upon the consummation of the Plan;

(9) current obligations at the effective date of the Plan arising out of the operation of the mortgaged property.

[fol. 145] No deduction shall be made for depreciation or obsolescence. The foregoing enumeration of items is not intended to set forth the order in which such items are to be paid.

Second, to the payment of non-cumulative income interest, if earned, on the certificates up to 2½% per annum;

Third, the balance, if any, shall be paid into the sinking fund for principal payments on the certificates.

3. The Trustee shall be vested with all the rights of an owner of the modified bond and mortgage. Upon foreclosure it shall have the power to acquire title to the mortgaged property and to apply the mortgage debt against the purchase price on the foreclosure sale, and, in the event that it shall upon foreclosure or otherwise acquire title to the mortgaged property, it shall have power to manage, lease and operate such mortgaged property. Upon the approval of a court having jurisdiction, after sixty days' prior notice given to certificate holders, the Trustee shall have power to modify and extend the modified bond and mortgage to the extent proposed in said notice, and to sell and convey the mortgaged property acquired by it on foreclosure or otherwise, for such price, whether in cash or securities, in whole or in part, and upon such terms and conditions and in such manner as may be proposed in said notice, provided, however, that if the holders of 51% of the principal amount of outstanding certificates file with the Trustee their written dissents from such modification, extension or sale, prior to [fol. 146] the approval thereof by said Court, that Court shall not approve said modification, extension or sale.

The Trustee shall have the power to receive money and distribute the same to certificate holders, and generally to do all things and execute all powers as may be consistent with the rights of an owner of the modified bond and mortgage. The Trustee, however, shall exercise all such rights and powers and shall hold such modified bond and mortgage, and/or the mortgaged property, in trust for the benefit of the certificate holders, as will be more particularly provided in the declaration of trust to be executed by the Trustee.

4. Any amounts received by the Trustee upon a sale of the mortgaged property, after the payment of proper charges and expenses, shall be distributed pro rata to the holders of the certificates, on account of principal and accrued interest, without preference or priority of principal over interest or interest over principal, and after the certificate holders have been paid in full the balance shall go

to The Prudence Company, Inc., to the extent of their advances and the balance shall go to the certificate holders pro rata.

5. The Trustee shall on the closing under this Plan execute and deliver to the trustees of The Prudence Company, Inc., a certificate evidencing the ownership by said trustees of a participating interest in the modified mortgage in the principal amount of $2,500, which certificate shall be on a parity with the certificates.

[fol. 147]

Part V

Disposition of the Sinking Fund

1. If on any interest payment date of any year there shall be $5,000 in the sinking fund, the Trustee shall by mail request tenders of their respective certificates from the certificate holders. Such requests shall be sent by ordinary mail to all the certificate holders of record at the time of such request at their addresses as shown by the books of the Trustee. Such requests shall, among other things, specify the date when submitted tenders shall be opened, which date shall be thirty days after the request for tenders has been mailed to certificate holders. Tenders shall be good only for the particular call on which such tenders are submitted, and after such opening all unaccepted tenders shall expire. Tenders shall be accepted by the Trustee at the lowest and successively next lowest prices at which they are tendered, except that no tenders shall be accepted unless the price is less than the face value of the certificate tendered, without interest, and unless sufficient funds are available in the sinking fund. In case tenders at equal prices are received in an amount in excess of the amount available in the sinking fund, the determination as to which of such tenders shall be accepted shall be made by lot.

2. Any balance in the sinking fund, after tenders have been called for and accepted and certificates purchased as hereinbefore provided, shall be used by the Trustee for the purchase of certificates in the open market at prices not greater than the par or face value of such certificates, with [fol. 148] accrued interest, if any. If such balance is not exhausted by such purchasers, any part thereof not so used shall be distributed by the Trustee pro rata among the cer-

tificate holders as a payment on account of principal, provided, however, that the Trustee shall not be required to make such distribution unless the funds on hand in the Sinking Fund are sufficient to enable the payment of a distribution which shall aggregate at least 2% of the face amount of the certificates then outstanding.

3. The certificates purchased shall be retired and canceled, and the principal amount of the modified bond and mortgage shall be reduced by the aggregate face value of the certificates so retired and canceled.

4. After the payment in full of all certificates and accrued interest and expenses hereunder, The Prudence Company, Inc., shall be reimbursed for all sums advanced by it and thereafter all income shall go to certificate holders.

Part VI

Certificates and Certificate Holders

1. The certificates shall be modified to conform to the provisions of this Plan. Upon the confirmation of the Plan all certificate holders shall be deemed to have assigned to the Trustee all their right and interest in and to the certificated bond and mortgage and to have received in lieu thereof rights as beneficiaries of the trust of said certificated bond and mortgage in acordance with the provisions of this Plan, and said certificates shall thenceforth evidence the extent of their interest as such beneficiaries.

[fol. 149] 2. As soon after the date of the confirmation of this plan as may be practicable, each certificate holder of this issue shall present his certificate to the Trustee, which shall, over its signature, endorse thereon or annex thereto an appropriate legend, in such form as may be approved by the Court, stating, among other things, that the rights of the certificate holder are subject to this Plan of Reorganization as confirmed by the Court and to all the terms of the declaration of trust herein provided for, to all the terms of which Plan and declaration of trust the holder of the certificate consents, and that the certificate is modified accordingly. After such endorsement, the certificate shall be returned to the certificate holder. The Trustee shall not be required to make any payment to the holder of any certifi-

cate unless and until such certificate shall be presented to it for endorsement as aforesaid.

3. Forthwith upon the confirmation of the Plan, and the assignment of the certificated bond and mortgage to it, the Trustee shall mail to the certificate holders a notice that said Plan has become effective and request that the certificate holders present their certificates to said Trustee in accordance with the provisions of this Plan. The names and addresses of the certificate holders shall be furnished by The Prudence Company, Inc., and its trustees, and by City Bank Farmers Trust Company, the depositary, to the extent that such information is available to any of them. The Trustee shall maintain suitable records showing the name and address of each certificate holder whose certificate has been so presented. Such certificates, when so endorsed, and all [fol. 150] the rights and interests represented thereby, shall be transferable subject to this Plan on the books of said Trustee by the registered holder thereof, in person or by duly authorized attorney, upon surrender or presentation of the certificates, as may be required by the Trustee. New certificates may be issued to transferees in such form as may be approved by the Trustee. The Trustee shall not be found to take notice of or be affected by any trust with respect to, or a defect in the title or ownership of, any such certificates. Said Trustee may, in its discretion, issue appropriate certificates evidencing transfers of fractional portions of certificates submitted for endorsement.

4. The certificates now outstanding, together with unissued certificates, amounting to the sum of $1,016,000, shall be entitled to participate in this Plan without priority of any one certificate over any other certificate.

Part VII

Application of Cash Held by Trustees of The Prudence Company, Inc.

All cash in the hands of the trustees of The Prudence Company, Inc., or their agents (less tax reserves, together with an additional reserve for accrued taxes to the date of closing, which shall be transferred to the Trustee to be held for payment of taxes) at the effective date of this Plan, representing collections of income from the mortgaged

premises, shall, unless otherwise provided herein, be applied in the following manner:

1. First, to the payment of creditors who have rendered [fol. 151] services or sold materials to The Prudence Company, Inc., or its trustees, or its or their agents acting under the assignment of rents, and to the payment of commissions due the managing agents of said property;

2. Next, to the payment of all expenses of reorganization under the Plan as hereinafter defined;

3. The balance of such cash, if any, shall be paid to the Trustee, to be placed in the sinking fund on account of principal on the certificates.

Part VIII

Reorganization Expenses

No holder of a certificate shall be required to pay any assessments or to advance any cash under the Plan and no part of the costs of reorganization shall be assessed against any holder of a certificate or against any certificate. Expenses of reorganization shall be paid from the income or proceeds of the mortgaged property or from the cash on hand with the trustees of The Prudence Company, Inc., and shall be deemed to include reasonable compensation and expenses of the depositary and its counsel, and of any other parties in interest and their counsel who shall be deemed by the Court to have rendered services in connection with the Plan, Federal and or State taxes, if any, and all other expenses, disbursements, obligations and liabilities paid or incurred in connection with or incident to the Plan. *All amounts to be paid on account of compensation and expenses shall be subject to the approval of the Court, and the amount of all such compensation and expenses shall be only such as shall be so approved.*

The claims of The Prudence Company, Inc., and the trustees of The Prudence Company, Inc., for their services and other charges in connection with the certificated bond and mortgage shall be discharged in full by the retention by the trustees of The Prudence Company, Inc., of all funds in their hands on the effective date of the Plan in the reserve account for servicing fees plus their usual commissions on those sums on hand available for interest distribution, and,

all claims for servicing fees in excess of such amount shall be waived and cancelled.

The fees of the counsel for the trustees of The Prudence Company, Inc., and Amalgamated Properties, Inc., shall be fixed by the Court and paid as an expense of reorganization in this proceeding, or in the general reorganization proceedings of The Prudence Company, Inc., or of Amalgamated Properties, Inc., as the Court shall determine. All proper disbursements of Amalgamated Properties, Inc., Debtor, made in this proceeding shall be deemed an expense of this reorganization.

Part IX

General Provisions

1. All assignments of rents of the mortgaged property now in existence shall be canceled.

2. As this Plan makes no separate provision for the holders of certificates who do not accept it, but treats both assenters and dissenters alike, it shall not become operative [fol. 153] until it is consented to by the holders of not less than two-thirds in amount of the certificates with respect to which claims shall have been allowed in these proceedings.

3. Any changes and modifications of the Plan proposed by any party in interest and made with the approval of the Court, after the hearing as provided by Section 77B of the Bankruptcy Act, shall be valid and effective, and any person or corporation having previously accepted the Plan shall be deemed to have accepted the Plan as so changed or modified; provided, however, that if, in the opinion of the Court, the change or modification will be materially adverse to the interests of such person or corporation, such person or corporation may withdraw his or its acceptance within a period to be fixed by the Court, and if he or it does not so withdraw, he or it shall be deemed to have accepted the Plan as so changed or modified.

4. The Prudence Company, Inc., and its trustees, Amalgamated Properties, Inc., and City Bank Farmers Trust Company, as depositary, and all others concerned with the Plan, are authorized and directed, with the approval of the Court, to execute such papers, make such arrangements and do such other things, whether herein specifically mentioned or

not, as may be necessary to carry out the Plan in its general purpose.

5. The liability of The Prudence Company, Inc., by reason of any guaranty or guaranties of the certificated bond and mortgage or of the certificates, and relating to the certificated bond and mortgage, shall not be discharged [fol. 154] by any action taken pursuant to this Plan, and the certificate holders hereby expressly reserve any and all rights which they may have against said guarantor or guarantors by reason of any breach of any such guaranty or guaranties. Said guarantor or guarantors shall have the right to discharge its, his or their obligations in part or in full at any time by payment to the Trustee. The right to enforce any such guaranty or guaranties shall be vested exclusively in the Trustee, and the certificate holders hereby transfer and assign such guaranty or guaranties and the right to enforce the same to the Trustee. The consent of The Prudence Company, Inc., or its trustees to the Plan or the receipt by it or them, in any capacity, of any of the benefits of the Plan shall not be deemed to constitute a waiver or relinquishment by it or them, in any capacity, of any defenses that it or they might, in any capacity, have to, or an admission of, any liability on its or their part under any guaranty of the certificated bond and mortgage and/or of the participating certificates, or to constitute a waiver or relinquishment of any claim by it or them that the effect of the Plan is to discharge The Prudence Company, Inc., in whole or in part from any obligation under said guaranty of The Prudence Company, Inc.

Article X

Tax Claims of the United States of America

The United States of America shall have the same remedies with respect to the collection of its tax claims and the same priority and preferences in payment, if any, out [fol. 155] of the mortgaged premises and the equipment contained therein as it would have had against said assets had proceedings for the reorganization of The Prudence Company, Inc., not intervened. All statutes of limitation upon the collection of such tax claims shall be suspended during the time proceedings for the reorganization of the 307 West 36th Street Certificate Issue and the guaranty of

The Prudence Company, Inc., thereof are pending, and if such tax claims shall be adjudged to have a lien, priority or preference against the mortgaged premises and the equipment contained therein for such additional period of time as such claims or any part thereof remain unpaid. Subject to its approval, the Court shall retain jurisdiction over the property covered by the Plan and over all parties appearing in the proceeding for the reorganization of the 307 West 36th Street Certificate Issue and the guaranty of The Prudence Company, Inc., thereof covered by the Plan for the purpose of carrying out and giving effect to any and all provisions of the Plan and the decree confirming the same, in so far as the Plan as so confirmed affects and applies to tax claims of the United States of America.

Dated, New York, November 1, 1937.

Respectfully submitted, Amalgamated Properties, Inc., Debtor.

Thomas Cradock Hughes and Emanuel Celler, Attorneys for Amalgamated Properties, Inc., Debtor, 331 Madison Avenue, New York City.

[fol. 156] Exhibit "2" Annexed to Affidavit of Charles H. Kriger

United States District Court, Eastern District of New York

In Proceedings for Reorganization of a Corporation under Section 77B of the Bankruptcy Act

No. 34791

Order Confirming Plan of Reorganization

In the Matter of Amalgamated Properties, Inc., Debtor

In the Matter of a Plan of Reorganization of the Debtor in Respect of the 307 West 36th Street First Mortgage Participation Certificates.

Order Confirming Plan of Reorganization

The Debtor above named having duly filed in this Court on March 17, 1936, its petition for reorganization under Section 77B of the National Bankruptcy Act and this Court,

by order dated March 17, 1936, having approved said petition as properly filed in the consolidated proceeding for the reorganization of The Prudence Company, Inc., Debtor, pending in this Court under Nos. 27496 and 27028, and having temporarily continued the Debtor in possession of its property and estate, and having thereafter permanently continued the Debtor in possession of its property and estate by order made and entered herein on April 15, 1936, and the proceeding of this Debtor having been severed from the aforementioned proceeding for the reorganization of [fol. 157] The Prudence Company, Inc., Debtor, by order of this Court dated April 22, 1938, and the Debtor herein having filed and proposed herein a Plan of Reorganization, dated November 1, 1937, for the 307 West 36th Street First Mortgage Participating Certificates (hereinafter more fully described) and the Debtor herein having filed and proposed amendments to the Plan of Reorganization dated February 15, 1938 for said certificates pursuant to order to show cause dated February 18, 1938, and said Plan together with said amendments thereto and all other matters referred to in said order to show cause, having duly come on for a hearing before this Court on the 11th day of March, 1938, and notice thereof by mailing and publication having been duly given, and copies of said Plan and the amendments proposed thereto having been mailed to the certificate holders, all as provided in said order to show cause, and due proof of said mailing and publication and the giving of notice having been duly filed herein, and the hearing brought on by, and all matters referred to in said order to show cause having duly come on to be heard on the 11th day of March, 1938, and said hearing having been duly adjourned from time to time by announcements in open Court as provided in said order to show cause, the last of said adjournments having been to the 3rd day of June, 1938, and objections having been filed to the Plan dated November 1, 1937, by or on behalf of certificate holders, and the Court having heard all persons in interest who desired to be heard, and satisfactory proof of all the matters herein dealt with having been presented to the Court, and the Court having heard all objections to said Plan, and having duly [fol. 158] considered said objections and all suggested and proposed changes, amendments and modifications thereof or in connection therewith, and proof having been taken

concerning the fairness and equitableness and feasibility of the Plan, and amendments proposed thereto and the Court having duly considered the same and being fully advised in the premises and being satisfied that all requirements for and conditions to the confirmation of the said Plan as amended and as further changed and modified as hereinafter in this order provided, as set forth in said Section 77B, having been met or complied with and proof having been adduced concerning the acceptances of the said plan, which acceptances have been duly filed herein, and due deliberation having been had thereon, and upon all the other papers, pleadings and proceedings heretofore had, filed and made herein, it is

Now, on motion of Thomas Cradock Hughes and Emanuel Celler, solicitors for the Debtor,

Ordered, adjudged and decreed that the Court (in addition to findings the facts above stated which are hereby found) finds as follows:

1. That the Debtor herein is the owner of certain real property (herein called the "Mortgaged Property") located at 307 West 36th Street, Borough of Manhattan, City, County and State of New York, on which is erected an eighteen story loft building.

2. That said Mortgaged Property is subject to the lien of a first mortgage made by Burnside Improvement Co. Inc. to 135 Broadway Holding Corporation and by mesne in- [fol. 159] struments was assigned on the 3rd of June 1927 to The Prudence Company, Inc., which mortgage is now in the principal amount of $1,016,000.00, and which mortgage together with the bond secured thereby (herein called the "Certificated Mortgage") is now held by City Bank Farmers Trust Company, as Successor Depositary, under the terms of a deposit agreement dated June 25, 1927 made between Prudence-Bonds Corporation and The Bank of America (predecessor of said Successor Depositary) pursuant to an assignment to said Depositary dated August 3, 1927, and recorded on the 9th day of August, 1927, in the office of the Register of the County of New York, in Liber 3814 at page 173 of Mortgages.

3. That on or about the 7th day of November, 1927, The Prudence Company, Inc. caused to be issued certificates of

participation in said Certificated Mortgage, which certificates are commonly known as the "307 West 36th Street Issue", (and which certificates are herein called the "Certificates" and the holders and owners thereof are herein called the "Certificate Holders") and that such Certificates were issued by Prudence-Bonds Corporation and guaranteed as to principal and interest on certain terms and conditions more fully set forth in a certain instrument of guarantee dated on or about the 3rd day of August, 1927, executed by The Prudence Company, Inc., by which they were sold to the public.

4. That there are now outstanding and unpaid Certificates in the aggregate principal amount of $1,013,500.00 of which $431,212.86 in principal amount are owned and held by John [fol. 160] M. McGrath and William T. Cowin, as Trustees of the Prudence Company, Inc.

5. That John M. McGrath and William T. Cowin, as Trustees of The Prudence Company, Inc., have an additional interest in the Certificated Mortgage in the sum of $2,500.00, for which amount Certificates held by the public were purchased by The Prudence Company, Inc., and were cancelled, for which no new certificates have been issued.

6. That by an assignment of rents agreement dated February 7, 1934, and effective as of March 4, 1933, the Debtor assigned to The Prudence Company, Inc. all the rents, issues, income and earnings then due and thereafter to become due and owing from or out of the Mortgaged Property.

7. That the Debtor herein on or about the 10th day of December, 1937, duly filed herein its Plan of Reorganization for the Certificates dated as of November 1, 1937.

8. That on or about the 19th day of November, 1937, there was duly made and entered herein an order to show cause for the proposal, consideration and confirmation of said Plan of Reorganization dated November 1, 1937, and pursuant to said order to show cause hearings were held and from time to time adjournments thereof were taken pursuant to announcements thereof made in open Court as provided in said order to show cause, and that at said hearings said Plan of Reorganization dated November 1, 1937, was duly proposed by the Debtor.

[fol. 161] 9. That thereafter and on or about the 11th day of March, 1938 the Debtor duly filed herein its proposed amendments to the Plan of Reorganization dated February 15, 1938.

10. That on the 18th day of February, 1938 there was duly made and entered herein an order to show cause for the proposal, consideration and confirmation of the Plan of Reorganization and amendments to the said Plan.

11. That thereafter pursuant to said order to show cause dated February 18, 1938 hearings were held before this Court and from time to time adjournments thereof were taken pursuant to announcements thereof made in open Court as provided for in said order to show cause, the last of said adjournments being to June 3, 1938, and that at a hearing held on March 11, 1938, said amendments to the Plan of Reorganization were duly proposed by the Debtor.

12. That from time to time there were proposed and suggested certain additional changes and modifications of said Plan, of which changes and modifications and the amendments referred to in paragraph 11 those more fully set forth in Exhibit "A" annexed hereto have been duly proposed and are hereby approved and the Plan of Reorganization is hereby changed and modified in accordance therewith and as so changed and modified is hereinafter called the "Plan".

13. That the changes and modifications set forth in said Exhibit "A" are not materially adverse to the interests of any creditor or stockholder who has previously accepted [fol. 162] the Plan of Reorganization dated November 1, 1937, and amendments to the Plan of Reorganization dated February 15, 1938.

14. That the holders of the 307 West 36th Street Certificates referred to in the Plan are creditors of the Debtor, Amalgamated Properties, Inc., herein within the meaning of Section 77B and for all purposes of said Section and of the Plan, its acceptance and confirmation.

15. That the Plan conforms with the provisions of Section 77B relating to the scope and contents of plans of reorganization and that this Court has jurisdiction to entertain the Plan and all proceedings in connection therewith and the

Plan is subject to being accepted by creditors pursuant to Section 77B with the effects provided in said Section 77B for such acceptance.

16. That this Court has jurisdiction to confirm the Plan upon appropriate findings that all applicable provisions of said Section 77B have been duly complied with.

17. That a reasonable time within which the claims and interests of creditors and stockholders might be filed or evidenced herein has been previously determined by order of this Court dated March 3, 1937, and entered in the proceeding for the reorganization of The Prudence Company, Inc., Nos. 27496 and 27028, and notice thereof was duly given pursuant to the terms of said order, and the time for the filing or evidencing of such claims and interests has expired, and all claims and interests not so filed or evidenced herein, be and they are hereby forever barred.

[fol. 163] 18. That all objections to the Plan heretofore filed or made herein be and they hereby are overruled and all changes and modifications proposed or suggested in this proceeding, to the extent that they are not incorporated in any changes and modifications included in Exhibit "A" annexed hereto, be and they hereby are disapproved.

19. That a reasonable period has been fixed by said order dated February 18, 1938 within which any creditor who had previously accepted said Plan dated November 1, 1937 might withdraw his acceptance thereof, and due notice of such period and of the right to withdraw such acceptance within such period has been given to such creditors pursuant to the direction contained in said order and no creditor having such right of withdrawal has withdrawn his acceptance within such period so fixed and all such creditors so accepting said Plan dated November 1, 1937 and said amendments to the Plan dated February 15, 1938 shall be deemed to have accepted the Plan.

20. That the Plan has been duly and properly proposed by the Debtor, Amalgamated Properties, Inc., in this proceeding.

21. That for the purposes of the Plan and its acceptance, the division of creditors and stockholders of the debtor, ac-

cording to the nature of their respective claims and interests, is hereby determined to be as follows:

Class 1. Holders of Certificates;

Class 2. Creditors who have rendered services or sold material to The Prudence Company, Inc. or its Trustees or its or their agents acting under the assignment [fol. 164] of rents referred to herein and in the Plan, including the Managing agents of said property;

Class 3. Other general creditors of the Debtor, Amalgamated Properties, Inc., including Reconstruction Finance Corporation;

Class 4. The State of New York and the City of New York, to the extent of their respective claims for taxes, if any, and the United States of America, whose claims, if any, are not affected by the Plan.

Class 5. Holders of the Common stock of the Debtor, Amalgamated Properties, Inc.

22. That the claims and interests of the creditors and stockholders enumerated in the foregoing paragraph 21 be and they hereby are allowed as filed and evidenced herein and that such creditors are the only creditors of the Debtor for the purposes of the Plan and its acceptance.

23. That due and reasonable notice of all hearings and adjournments thereof in connection with the Plan held in this proceeding has been given to the Debtor, to all creditors and parties interested herein and to the stockholders of the Debtor, in conformity with the provisions of Section 77B of the Bankruptcy Act, and that in accordance with the previous orders of this Court and the provisions of said Section, a copy of the Plan and the amendments thereto dated February 15, 1938, have been duly sent to each creditor and to all parties interested herein and to the Debtor and the stockholders of the Debtor, and due notice of said [fol. 165] hearings and of the hearing for the confirmation of the Plan has been given, and the Debtor, all creditors and stockholders of the Debtor, and all other parties interested have had notice and opportunity to be heard on, and to make objections to, the Plan and its confirmation.

24. That the Debtor is not a utility nor a public utility corporation and is not subject to the jurisdiction of a regula-

tory commission or commissions or regulatory authority or authorities created by the laws of the state or states in which the properties of the Debtor are operated.

25. That all amounts to be paid by the Debtor and all amounts to be paid to committees whether or not by the Debtor for services or expenses incident to the reorganization have been fully disclosed and are reasonable or are to be subject to the approval of the Judge.

26. That the offer of the Plan and its acceptance are in good faith and have not been procured by any means or promises forbidden by the Bankruptcy Act.

27. That the Plan has been duly accepted in writing and such acceptances have been duly filed in this proceeding by, or on behalf of, stockholders of the Debtor holding a majority of the stock of each Class.

28. The Plan has been duly accepted in writing and such acceptances have been duly filed in this proceeding by, or on behalf of, creditors holding two-thirds, or more, in [fol. 166] amount of the claims of each Class whose claims have been allowed and would be affected by the Plan, except those creditors specifically mentioned in paragraph 30 hereof.

29. The Plan has been accepted as required by the provisions of Subdivision (e), Clause 1, of Section 77B.

30. That the acceptance of the creditors included in Class 2 as set forth in paragraph 21 hereof and of the State of New York and the City of New York are not requisite to the confirmation of the Plan for the reason that the Plan makes provision for the payment of their claims in cash in full; and the acceptance of the United States of America is not requisite to the confirmation of the Plan for the reason that its claim is not affected by the Plan.

31. That there are no contracts of the Debtor affecting the property dealt with by the Plan other than existing leases to tenants of portions of the Mortgaged Property, which are executory, in whole or in part, and except the assignment of rents agreement hereinbefore mentioned, and there are no unexpired leases of the Debtor affecting said Mortgaged Property which have been rejected or surrendered.

32. That the Judge being satisfied that by reason of the number of securities of the Debtor outstanding and the extent of the public dealing therein, the preparation of a statement showing what, if any, claims have been purchased or transferred by those accepting the Plan after the commencement of, or in contemplation of, this proceeding and [fol. 167] the circumstances of such purchases or transfers, would be impractical, such statement shall not be filed.

33. That there has been filed herein pursuant to Subdivision (e) Clause (1) of Section 77B a statement verified by the Secretary of the Debtor showing the number of shares of stock which have been transferred by those accepting the Plan after the commencement of, or in contemplation of, this proceeding and the circumstances of such purchase or transfer, and the form and sufficiency of such statement are hereby approved.

34. That the Plan is fair and equitable and does not discriminate unfairly in favor of any class of creditors or stockholders and is feasible.

35. That the Plan complies with the requirements of Subdivisions (b) and (f) and all other applicable provisions of Section 77B of the Bankruptcy Act.

36. That the Debtor has filed such schedules and submitted such other information as has been necessary to disclose the conduct of the Debtor's affairs with respect to the property dealt with by the Plan, and the fairness of the Plan.

37. That the Debtor and any other corporation organized or to be organized issuing securities or acquiring property under the Plan are authorized by charter and applicable State or Federal laws, upon confirmation of the Plan, to take all action necessary to carry out the Plan and shall have full power and authority to, and shall, put into effect and [fol. 168] carry out the Plan and the orders of this Court relative thereto under and subject to the supervision and control of this Court.

38. That the Plan be and the same hereby is in all respects approved and confirmed.

39. That upon the final consummation of the Plan and the transfer of the property thereby dealt with, the Mortgaged

Property shall be free and clear of all liens and claims of the Debtor, its stockholders and creditors, except the lien of the Certificated Mortgage thereon as modified pursuant to the Plan, and the lien of any unpaid water rates, taxes and assessments.

40. That the Debtor, the Trustees to be appointed herein, City Bank Farmers Trust Company, as Depositary, and Trustees of The Prudence Company, Inc., and all other parties herein are hereby authorized and directed to take such action as may be necessary and proper to carry out and consummate the Plan, without any further order of this Court, including specifically, but without limitation, the transfer and conveyance of the Mortgaged Property as provided in the Plan and the assignment of the Certificated Mortgage as provided in the Plan, and the execution and delivery of all documents necessary to consummate the Plan.

41. That upon the final consummation of the Plan and the transfer of the property dealt with thereby, all rights of Prudence-Bonds Corporation and Charles H. Kelby and Clifford S. Kelsey, its Trustees, and of the new Prudence-Bonds Corporation organized in March 1938, and of The Prudence Company, Inc. and Stephen Callaghan, John M. [fol. 169] McGrath and William T. Cowin, its Trustees, and of City Bank Farmers Trust Company, as Depositary, and of anyone claiming any rights to service the Certificated Mortgage or the Certificates or to perform any acts whatsoever in connection therewith, whether as agent, trustee, grantee or substituted grantee of powers in trust, or in any other capacity whatsoever, are hereby revoked, terminated and cancelled, and all claims of any nature whatsoever which the foregoing, or any of them, have, or may have, against the property of the Debtor dealt with by the Plan and against the Certificates, the Certificated Mortgage affecting said property and against any personal property of the Debtor in the Mortgaged Property are hereby revoked, cancelled and terminated, except in so far as the claims of The Prudence Company, Inc., and its Trustees have been specifically allowed herein and are otherwise dealt with in the Plan.

42. The provisions of the Plan and of this order shall be binding upon the Debtor, all stockholders thereof including

those who have not as well as those who have accepted it, and all creditors, both secured and unsecured, whether or not affected by the Plan and whether or not their claims have been filed, and, if filed, whether or not approved, including persons who have not, as well as persons who have, accepted the Plan.

43. Pursuant to the Plan George L. Long, Joseph W. Ferris and Henry Liefert are hereby appointed the Trustees under the Plan with all the rights, powers and duties set forth therein and to be contained in the Declaration of Trust to be executed pursuant to the Plan, and said George L. [fol. 170] Long, Joseph W. Ferris and Henry Liefert before receiving any of the property to be assigned or conveyed pursuant to the Plan shall file a surety company bond in the sum of $15,000.00 with the Clerk of this Court in this proceeding.

44. The Court retains exclusive jurisdiction of this proceeding and of the Debtor and its property for the following purposes, among others:

(a) to supervise and control the consummation and carrying out of the Plan, including the matters required by this order to be performed, and to consider and pass upon the form, execution, delivery and sufficiency of all instruments and documents to be executed in connection with the Plan and the consummation thereof;

(b) to allow reasonable compensation for the services rendered and reimbursement for the actual and necessary expenses incurred in connection with the Plan and the proceeding and to direct the payment of the amounts so fixed in accordance with such terms as may to it seem fair;

(c) to determine any and all controversies which may arise with respect to the consummation of the Plan;

(d) generally to determine any and all matters pertaining to this proceeding or to the Plan and not determined heretofore or by this order; and to make from time to time such further or other order or orders as this Court may deem just and proper in the exercise of the jurisdiction and powers conferred upon it by Sections 77A and 77B of the National Bankruptcy Act as amended.

[fol. 171] 45. In the event that any vacancy shall occur in the office of the trustee by reason of death, resignation re-

moval etc., the vacancy shall not be filled and the remaining trustee or trustees shall continue to act as sole trustee or trustees.

Dated at Brooklyn, N. Y. this 14th day of June, 1938.

Grover M. Moscowitz, *U. S. D. J.*

EXHIBIT "A"

Amendments Approved and Allowed

Part I shall be amended by adding a new definition as follows:

> "Certificate Holder means the owner and holder of a certificate including the owner and holder of an allonge or separate instrument described in Part VI, Section 2."

Part III shall be amended by adding at the end of the first paragraph the following sentence:

> "The Mortgaged Premises shall be held by the Trustee for the pro rata benefit of the Certificate Holders as shall be more fully provided in the Declaration of Trust."

Part IV, Section 2 shall be amended by striking out the last six words in paragraph "Third" reading "for principal payments on the certificates" so that the sentence shall read as follows:

> "Third, the balance, if any, shall be paid into the Sinking Fund."

[fol. 172] Part IV, Section 2 shall be amended by adding a paragraph as follows:

> "Fourth, when all certificates have been retired or redeemed, then semi-annually pro rata among the holders of allonges or separate instruments described in Part VI, section 2."

Part IV, Section 3 shall be amended to read as follows:

> "3. The Trustees shall be vested with all the rights of an owner of the modified bond and mortgage. Upon

foreclosure it shall have the power to acquire title to the mortgaged property and to apply the mortgage debt against the purchase price on the foreclosure sale, and, in the event that it shall upon foreclosure or otherwise acquire title to the mortgaged property, it shall have power to manage, lease and operate such mortgaged property. Upon the approval of a court having jurisdiction, after sixty days prior notice given to certificate holders, the Trustee shall have power to modify and extend the modified bond and mortgage to the extent proposed in said notice, and to sell and convey the mortgaged property acquired by it on foreclosure or otherwise, for such price, whether in cash or securities, in whole or in part, and upon such terms and conditions and in such manner as may be proposed in said notice, provided, however, that if the holders of 51% of the principal amount of outstanding certificates file with the Trustee their written dissents from such [fol. 173] modification, or extension or if the holders of 51% of the allonges or separate instruments described in Part VI, section 2 hereof, file their written dissents from such sale, prior to the approval thereof by said Court, that Court shall not approve said modification, extension or sale."

Part V, Section 2, shall be amended by omitting the word "purchasers" in the seventh line and inserting in place thereof the word "purchases."

Part VI, Section 2, shall be amended by striking out the present Section 2 and substituting the following:

"2. As soon after the date of the confirmation of the Plan as may be practicable, each certificate holder shall present his Certificate to the Trustee which shall affix a stamp to the effect that the Certificates are modified pursuant to the Plan and that an allonge has been annexed to such Certificate. The Trustee shall annex to the Certificate an allonge over its signature in such form as may be approved by the Court, which shall state among other things that the rights of the Certificate Holder are subject to this Plan of Reorganization as confirmed by the Court and to all the terms of the Declaration of Trust herein provided for, to all the terms of which Plan and Declaration the Holder of the Cer-

tificate consents, and that the Certificate is modified accordingly. Such allonge shall further state in substance that the Trustee holds the mortgaged property for the pro rata benefit of the holders of all Certificates and that if a Certificate should be retired and cancelled [fol. 174] pursuant to the Plan such allonge shall then be detached and returned or a separate instrument to like effect shall be executed and delivered to the registered holder of the Certificate as of the date of cancellation of such Certificate and such allonge or separate instrument shall thereupon represent the interest of the holder thereof in the real property so held by the Trustee and/or any proceeds of the sale thereof, and such allonge or separate instrument shall thereafter be transferable upon the books of the Trustee in the same manner as herein provided for the transfer of Certificates. Such allonge shall further state that prior to the cancellation and retirement of the Certificate to which it is attached the allonge shall not be separately transferable by the Certificate Holder. After such stamping of the Certificate and the affixation of the allonge as aforesaid, the Certificate so stamped and with such allonge attached shall be returned to the Certificate Holder. The Trustee shall not be required to make any payment to the holder of any Certificate unless such certificate shall have been presented to it for stamping and the affixation of the allonge as aforesaid. No distribution of payment shall be made on any allonge or separate instrument herein described until all mortgage certificates shall have been redeemed or retired. The Declaration of Trust shall contain appropriate provisions to carry out the foregoing."

Part VI, Section 4 shall be amended by striking out the present Section 4 and substituting the following:

[fol. 175] "4. Except as in this section provided, the certificates now outstanding, including so-called 'unissued certificates,' amounting in the aggregate to the sum of $1,016,000 shall be entitled to participate in this Plan without priority of any one certificate over any other certificate but the certificates held by The Prudence Company or its Trustees shall not be retired or redeemed from the Sinking Fund at the first request

by the Trustee for tenders pursuant to the provisions of Article V provided however that such first request for such tenders of certificates is made by the Trustee within eighteen months from the effective date of the Plan. A question has arisen with respect to the rights of The Prudence Company, Inc., or its Trustees on account of the certificates held or claimed by them, including so-called 'unissued certificates.' Anything in the Plan to the contrary notwithstanding, the Trustees to be appointed hereunder shall make no distributions of cash or other property or securities which would be otherwise distributable on account of the certificates now held or claimed by The Prudence Company, Inc., or its Trustees, including said 'unissued certificates,' unless and until it shall have been finally adjudicated by a Court of competent jurisdiction whether or not The Prudence Company, Inc., or its Trustees, or their successors or assigns, are entitled to receive such cash or other property or securities and to share in the proceeds of the property to be assigned to the Trustee pursuant to the Plan and on a parity with other certificate holders or otherwise. The actual distribution of [fol. 176] such cash, securities or other property shall be made in accordance with such final adjudication. Pending such final adjudication the Trustee to be appointed pursuant to the Plan shall hold in escrow the share of any cash, property or other securities distributed under the Plan to which the certificates held by The Prudence Company, Inc., or its Trustees, including said 'unissued certificates,' would be entitled if owned and held by persons other than The Prudence Company, Inc., or its Trustees. Should such certificates held by The Prudence Company, Inc., or its Trustees or assignees be adjudicated to be subordinate to the publicly held certificates then one-half of any sums payable as interest, to which such certificates would otherwise have been entitled shall be paid into the Sinking Fund for retirement of certificates and the balance shall be paid as additional interest on publicly held certificates for the year in which said interest became due, until a total amount of interest not exceeding 5% per annum for such year, non-cumulative, including the regular interest payable on the publicly held certificates under the Plan has been paid on said publicly held certificates

and any balance remaining shall be paid into the sinking fund for certificates. Until such final adjudication such certificates and said unissued certificates shall not be subject to purchase, retirement or redemption out of the Sinking Fund. All documents necessary to carry this paragraph into effect shall contain such provisions with respect to the duties of the Trustee to be appointed [fol. 177] under the Plan as shall be appropriate to carry out the intent hereof pending such final adjudication."

Part IV, Section 4 shall be amended by striking out the words in the last sentence reading: "and the balance shall go to the certificate holders pro rata" and a period shall be inserted after the word "advances". A new sentence shall be added to follow the word "advances" as follows:

"The balance of any net proceeds shall be distributed by the Trustee pro rata among the holders of all mortgage certificates (not certificate holders as herein defined) then outstanding but not to exceed par, plus accrued interest and the balance, if any, pro rata among the holders of the allonges or separate instruments described in Part VI, Section 2 hereof."

Part III shall be amended by adding a paragraph as follows:

"The consideration to be paid to Amalgamated Properties, Inc., simultaneously with such transfer and conveyance of the Mortgaged Premises shall be the sum of $1,000, which shall be paid out of the moneys obtained from the operation of the Mortgaged Premises."

[fol. 178] In Supreme Court of New York, County of New York

[Same Titles.]

Affidavit of Frederic P. Rich, Read in Opposition to Motion

State of New York,
County of New York, ss:

Frederic P. Rich, being sworn, says:

That he is a member of the law firm of Delafield, Marsh, Porter & Hope, attorneys for the defendants, City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees above described, and submits this affidavit in answer to the application of the defendant, Prudence Realization Corporation, brought on by notice of motion dated June 5, 1942, in which the defendant, Prudence Realization Corporation, seeks an order dismissing the complaint herein and striking out the answer interposed by defendants, City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees as aforesaid. This answering affidavit is made by affiant, and not by the defendants for whom his firm are attorneys, for the reason that affiant is more familiar with the facts and proceedings herein mentioned than said defendants.

The action #1 was commenced by plaintiffs, as Trustees of a certificated bond and mortgage on property located at 307 West 36th Street, New York City. Plaintiff was appointed as such Trustee pursuant to a Plan of Reorganization relating to said property affecting the Burnside [fol. 179] Issue of Prudence Certificates, which was consummated under Section 77B of the Bankruptcy Act in the United States District Court, for the Eastern District of New York, under the provisions of which plaintiff holds and administers the certificated mortgage for the benefit of the holders of certificates of participation in such mortgage. Action #2 was commenced by the plaintiffs therein named and raises substantially the same issue as in action #1, so that the two actions were consolidated by order of Honorable Peter Schmuck, a Justice of this Court, made September 3, 1941. The total principal amount of outstand-

ing certificates is $1,016,000, of which defendant, Prudence Realization Corporation, is the owner of certificates in the principal amount of $431,212.86. Prudence Realization Corporation is the successor to The Prudence Company, Inc. under a Plan of Reorganization of The Prudence Company, Inc. which was also confirmed under Section 77B of the Bankruptcy Act in the United States District Court, for the Eastern District of New York.

The said Prudence Company, Inc. was a mortgage guarantee company, which originally sold to the public said certificates of participation with its guarantee of the payment thereof endorsed thereon. The practice followed on the sale of such certificates is described in the case of *In re The Westover, Inc.*, 82 Fed. (2d) 177; *In re Prudence Co. Inc.*, 89 Fed. (2d) 689, and *In re Prudence Co. Inc.*, 98 Fed. (2d) 559. These details, however, are not important for purposes of this motion.

The purpose of the action brought by plaintiff is to obtain a determination of this Court as to whether the certifi- [fol. 180] cates of the Burnside Issue owned by Prudence Realization Corporation are entitled to participate in the trust estate created by the Plan relating to the Burnside Issue on a parity with the holders of the publicly owned certificates, and for instructions as to the disposition to be made of the sum of $26,950.80 which has been accumulated in connection with the certificates held by Prudence Realization Corporation.

Defendants, City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees as aforesaid, have been joined in the action by plaintiff as parties defendant in their capacity as holders of publicly owned certificates representative of their class, and have interposed an answer herein on behalf of themselves and on behalf of all certificate holders similarly situated. The effect of such answer is to submit the issue as to the rights of Prudence Realization Corporation to the Court and to ask affirmatively that a determination be made subordinating the certificates owned by Prudence Realization Corporation, and directing that the funds held by plaintiff on account of such certificates shall be applied for sinking fund purposes in the manner specified in the Burnside Plan of Reorganization and as hereinafter more particularly described.

In order to present clearly the real question to be determined by this Court, it is necessary to set forth the pro-

ceedings taken leading up to the present action and to show how different results were accomplished than was the case in *Prudence Realization Corporation* v. *Geist*, 62 S. Ct. 978 (1942) involving the Zo-Gale Issue of Prudence Certificates, which is cited in the moving papers as controlling precedent on the present application.

[fol. 181] Subsequent to the original sale of the Burnside certificates by The Prudence Company, Inc., the then owner of the mortgaged property defaulted in the payment of interest. The Prudence Company, Inc., which, upon the sale of such certificates had retained the right to "service" such certificate issue, thereupon arranged to take from the owner of such property a deed subject to the certificated mortgage. Such deed was taken in the name of Amalgamated Properties, Inc., a corporate affiliate of The Prudence Company, Inc., which among other things, had been formed to take title to properties in the case of defaulted issues. Similarly, in connection with the Zo-Gale Issue, title to the mortgaged property had also been taken by Amalgamated Properties, Inc. along with title to several other properties securing other Prudence certificate issues. The action taken in the proceedings hereinafter described, however, distinguishes the Zo-Gale Issue from the Burnside Issue with respect to the question before this Court.

On or about February 1, 1935, The Prudence Company, Inc., being then in default in the payment of its guarantee obligations and owing a substantial amount of money which it had borrowed from Reconstruction Finance Corporation, filed its petition for reorganization under Section 77B of the Bankruptcy Act which was approved by the United States District Court, for the Eastern District of New York. Thereafter, on March 16, 1936, a petition for the reorganization of Amalgamated Properties, Inc. under Section 77B was also approved by the United States District Court, for the Eastern District of New York.

During the course of these reorganization proceedings, separate plans of reorganization were proposed by Amal-
[fol. 182] gamated Properties, Inc. in the proceeding for its reorganization, each such plan involving the separate and independent reorganization of the respective properties to which title had been taken by Amalgamated Properties, Inc. This procedure was adopted in pursuance of the provisions of Section 77B of the Bankruptcy Act per-

mitting separate reorganizations of different properties owned by the same debtor.

One of the very first of such separate and independent plans of reorganization related to and dealt solely with the Zo-Gale Issue. Under this plan, title to the certificated mortgage, together with the property securing the same, was conveyed to A. Joseph Geist, as Trustee for the certificate holders of the Issue to hold for the benefit of certificate holders of such Issue. The Plan was formulated in its final form as of December 10, 1937. It contained no specific reference to any certificates owned by The Prudence Company, Inc.

Prior to the confirmation of such Plan by the Court, it appeared that The Prudence Company, Inc. was the owner of certificates in the principal amount of $816.67 and held an interest in the certificated mortgage in the principal amount of $7,200 which had not been sold to the general public in the form of certificates. On February 19, 1938, the Court made an order confirming the Plan in the form indicated above, but provided in such order (not as part of the Plan) as follows:

> "Some question has arisen with respect to the rights of The Prudence Company, Inc. on account of $816.67 of Certificates held or claimed by that Company and [fol. 183] its Trustees, and question has also arisen with respect to the interest in said Mortgage (being the $7,200 principal amount thereof not represented by outstanding Certificates) owned or claimed by The Prudence Company, Inc. and its Trustees and/or by Prudence-Bonds Corporation and its Trustees. Anything in the Amended Plan to the contrary notwithstanding, the Trustee under the Amended Plan shall make no distributions of cash and/or securities on account of the Certificates now held or claimed by The Prudence Company, Inc. and its Trustees, or on account of the part of said Mortgage which is not represented by outstanding Certificates, unless and until it shall have been finally adjudicated by a court of competent jurisdiction that The Prudence Company, Inc. and its Trustees and/or Prudence-Bonds Corporation and its Trustees are entitled to share in the trust estate by reason thereof. Pending final adjudication of such question, said Trustee shall hold in

escrow the share of any cash and/or securities distributable under the Amended Plan, to which such Certificates held or claimed by The Prudence Company, Inc. and/or its Trustees would be entitled, if owned and held by someone other than The Prudence Company, Inc. and its Trustees, and the share of any cash and/or securities distributable thereunder to which the part of said Mortgage which is not represented by outstanding Certificates would be entitled if it were represented by outstanding Certificates owned and held by someone other than The Prudence Company, [fol. 184] Inc. and its Trustees and/or Prudence-Bonds Corporation and its Trustees, and the cash and/or securities so held in escrow by said Trustee shall be distributed by the Trustee, without interest, in accordance with the final adjudication of such court. Pending such adjudication, the Certificates so held or claimed by The Prudence Company, Inc., and its Trustees, and the part of said Mortgage which is not represented by outstanding Certificates shall not be subject to purchase out of the sinking fund provided for in said Amended Plan. Without prejudice to the rights, if any, of The Prudence Company, Inc. and its Trustees, the Trustee under said Amended Plan shall on the closing under said Plan, execute and deliver to Charles H. Kelly and Clifford S. Kelsey, as Trustees of Prudence-Bonds Corporation, a certificate in the name of said Trustees of Prudence-Bonds Corporation, evidencing an interest in the trust estate of $7,200 principal amount and interest, subject, however, to the terms hereof."

Thereafter, and before any order had been made terminating the reorganization proceeding with respect to the Zo-Gale Issue, an application was made by A. Joseph Geist, as Trustee under the plan, to the Federal Bankruptcy Court before which the reorganization proceeding was still pending, for an order determining "that the Trustee of The Prudence Company, Inc. and its successor, Prudence Realization Corporation, is not entitled to any distribution out of the trust estate on account of the shares held by it until the certificate holders have been paid in full * * *." [fol. 185] On the above described application of A. Joseph Geist, the Federal Reorganization Court held that Prudence Realization Corporation was not entitled to share on a

parity with other certificate holders in a distribution of the moneys derived from the property securing the Zo-Gale Issue. Such decision was affirmed by the Circuit Court of Appeals for the Second Circuit, but the United States Supreme Court granted certiorari "because of the importance in bankruptcy administration of the questions raised" and thereupon reversed the decisions of the lower Federal Courts. The opinion of the United States Supreme Court is reported in the case of *Prudence Realization Corporation* v. *Geist*, referred to above and cited in the moving papers herein as legal precedent binding upon this Court on the present motion.

It is to be emphasized again that the sole issue before the Court in the case involving the Zo-Gale Issue was the determination of a claim in a Federal Bankruptcy proceeding, and the sole question involved in that case was whether such claim should be determined by the Federal rules relating to distribution in bankruptcy or whether the principles enunciated by the New York State Court of Appeals in the cases of *Pink* v. *Thomas*, 282 N. Y. 10; *Matter of Title & Mortgage Guaranty Company*, 275 N. Y. 347, should control the Federal Bankrutcy Court. It was held by the Supreme Court that the Federal rules of bankruptcy should determine the rights of the parties, since "in the interpretation and application of Federal Statutes, Federal, not local, law applies." It was further held that, under the bankruptcy rule adopted by the Court, Prudence Realization Corporation was entitled to partici-[fol. 186] pate in the distributions on a parity with other certificate holders.

In connection with the Burnside Issue, however, which is presently before this Court, there is no such question as to the interpretation of a Federal Bankruptcy Statute and the rights of claimants in a bankruptcy proceeding. In the moving papers on this application, it is alleged in effect that the determination of the rights of Prudence Realization Corporation as a claimant in the bankruptcy proceeding were merely deferred in the same manner as in the case involving the Zo-Gale Certificate Issue. The court's attention, however, is respectfully called to the fact that the contrary is true; that whereas in the Zo-Gale case the Bankruptcy Court specifically reserved the determination as to the rights of Prudence Realization Corporation

in an order made in the bankruptcy proceeding and thereafter adjudicated such rights, no such reservation was made with respect to the Burnside Issue, and the situation was specifically covered in the Plan of Reorganization in the manner hereinafter set forth so that the rights might be determined as a matter of substantive State Law.

In fact, on January 17, 1941, an order was made terminating the entire reorganization proceeding of Amalgamated Properties, Inc. with the single following exception:

> "Ordered, adjudged and decreed that the debtor, Amalgamated Properties, Inc., is hereby discharged from the control and supervision of this Court * * * and these proceedings shall hereafter be treated as dismissed for all purposes, except the determination of [fol. 187] the questions raised in the pending motion by A. Joseph Geist, the Trustee appointed by this Court pursuant to the plan of reorganization herein for the certificated mortgage on premises known as 202 Riverside Drive, Borough of Manhattan, City and State of New York (Zo-Gale Issue), for determination of the relative priorities in said certificated mortgage of the certificates held by prudence Realization Corporation and the certificates held by the public."

The provisions of the Plan in the Burnside Issue (which were incorporated into the indentures necessary to consummate the Plan), far from preserving the rights of the parties in bankruptcy, actually changed the relationship between the parties as mere claimants in bankruptcy and specified how the moneys applicable to the Prudence owned certificates should be distributed upon the contingencies mentioned in the Plan. The distributions provided in the Plan were entirely different from the distribution which would have been made in bankruptcy without such a plan. The Plan and the papers carrying it into effect specifically provided that, in the event it should be determined by "a court of competent jurisdiction" that the certificates held by Prudence Realization Corporation were subordinate, then the moneys otherwise payable on such certificates should not be paid to the owners of the publicly owned certificates on account of their past due interest and principal (as would have been the case on a bankruptcy distribution), but that one-half of such moneys should be paid into a sink-

ing fund for the retirement of the publicly owned certifi-
[fol. 188] cates, and the balance should be paid as addi-
tional interest to the holders of publicly owned certificates until the total amount of interest for the fiscal year in which such distribution is made shall have been paid on such publicly owned certificates at the rate of 5% per annum, provided that any moneys in excess of the amount necessary to pay interest at such a rate should be also used for sinking fund purposes.

The Plan in the Burnside Issue also made provisions that in the event that it should be determined that the Prudence owned certificates were entitled to share on a parity with the other certificates. Prudence would be entitled to participate in the Plan as beneficiaries of the trust created by such Plan for the benefit of certificate holders. The provisions of the Declaration of Trust executed in pursuance of the Plan of Reorganization relating to the Burnside Issue are set forth in the plaintiffs' complaint herein in action #1. In short, by virtue of the confirmation of the Plan, Prudence Realization Corporation stands in a far better position than if their rights had been determined as a matter of bankruptcy distribution and if distribution had been directed in accordance with the bankruptcy rules. Having accepted the benefits of the Plan and having elected to have the distributions to it governed by the Plan instead of the rules of bankruptcy distribution, Prudence Realization Corporation should not now be heard to argue that such rights should be determined in accordance with the bankruptcy rules of distribution as distinguished from the New York State rules of parity which control the rights of the parties except to the extent that a bankruptcy distribution may be entailed.

[fol. 189] Having approved the Plan in the Burnside Issue containing the provisions discussed above, in December, 1940, an order was made by the Bankruptcy Court specifically directing that the bankruptcy proceedings with respect to the Burnside Issue should be "terminated and finally closed", and providing as follows:

> "All creditors and claimants against * * * claiming any interest of any kind or nature whatsoever upon or against the above mentioned property of the debtor (Amalgamated Properties, Inc.) be, and they hereby are, forever restrained and enjoined from commence-

ing * * * any suits or other proceedings of law or in equity or otherwise against the debtor herein * * * on account of or based in any way upon any right, claim or interest of any kind or nature whatsoever which any such creditor, claimant * * * may heretofore have had in, to or against said debtor in connection with the aforementioned property."

Clearly the question of determining the rights of Prudence Realization Corporation is no longer a matter of determining a claim in bankruptcy but a matter of substantive State law.

One further fact should be called to the Court's attention. In the opinion of the United States Supreme Court in the Zo-Gale case, there appears to be some suggestion to the effect that in the event that it should be determined that Prudence is entitled to parity on the certificates held by it, it would benefit the Prudence estate and consequently the holders of all certificate issues guaranteed by Prudence who are entitled to receive payments therefrom on the [fol. 190] guarantees held by them. After first holding that the rule to be applied in that case was not the State Court rule of parity and that the Federal Court was free to formulate its own rule of bankruptcy distribution, the United States Supreme Court indicated that the holders of the publicly owned certificates in the *Zo-Gale* Issue should not benefit at the expense of the holders of certificates of other issues which were also guaranteed by The Prudence Company, Inc. Accordingly, it determined that under the Federal rule of bankruptcy distribution ("Equity is equality"), the certificates of the Zo-Gale Issue owned by the Prudence Estate should be accorded parity. While affiant realizes that the determination of the United States Supreme Court is binding upon any court which is required to apply the bankruptcy rules of distribution, since this Court on the present motion is not required to apply such rules for the reasons above discussed, affiant respectfully calls to this Court's attention the following equitable considerations which the United States Supreme Court seems to have overlooked in its opinion. There is annexed to the moving papers herein a copy of the Plan of Reorganization of The Prudence Company, Inc. Under the terms of this Plan, creditors, other than the holders of guaranty claims, are entitled to participate in any distribution from the Prudence estate on their

claims in the amount of $11,848,000. Although the aggregate of the claims of certificate and bondholders holding guarantees of The Prudence Company, Inc. is $122,214,000, for the purposes of all but the preliminary distribution under the Plan, such claims are required to be reduced under the terms of the Plan to the extent of the value of the mort- [fol. 191] gage collateral held by each of the guaranty claimants. The result is that a substantial portion of any recovery effected by Prudence Realization Corporation (in the event that it should be determined that it is entitled to parity on the certificates owned by it), will be for the benefit of creditors of The Prudence Company, Inc. other than the holders of certificates and bonds of other issues.

Affiant respectfully submits that this Court should determine the present motion in accordance with State law as set forth in the decisions of the Court of Appeals in *Pink* v. *Thomas*, and *Matter of Title & Mortgage Guaranty Company*, hereinbefore referred to, under which the certificates owned by Prudence Realization Corporation are subordinate.

Frederic P. Rich.

(Sworn to June 12, 1942.)

In Supreme Court of New York, County of New York

Reply Affidavit of Irving L. Schanzer, Read in Support of Motion

State of New York,
County of New York, ss.:

Irving L. Schanzer, being duly sworn, deposes and says:

Deponent is counsel for Prudence Realization Corporation, the moving party herein, and makes this affidavit in [fol. 192] reply to the affidavits submitted in opposition to the instant application by Frederic P. Rich and by Joseph W. Ferris, George L. Long and Henry Leifert. The reason this affidavit is made by deponent is that the matters set forth in this affidavit are within the personal knowledge of deponent since he was associated with counsel for the trustees of The Prudence Company, Inc. from September 1935 to June 1, 1939 and throughout said period such counsel for the trustees were also counsel for Amalgamated Prop-

erties, Inc., Debtor. Since June 1, 1939 deponent has been counsel for Prudence Realization Corporation and counsel of record for Amalgamated Properties, Inc. in the proceedings for its reorganization in the United States District Court for the Eastern District of New York. An examination of the affidavits submitted in opposition indicates that there is no triable issue of fact and that the matters involved on this motion may be determined by summary judgment without the necessity of a trial. Mr. Rich's affidavit for the most part consists of legal argument, the only facts being asserted which were not included in the moving papers dealing with the closing of the proceedings for the reorganization of the Burnside First Mortgage Participation Certificate Issue and the dismissal of the Amalgamated Properties, Inc. proceeding and the necessity for the order closing the instant certificate issue reorganization.

The only statement contained in Mr. Rich's affidavit which is stated as a fact, but in reality is a conclusion, is the one referring to the reservation of the question of parity for future determination and in that respect Mr. Rich states that it was specifically covered in the plan of [fol. 193] reorganization "so that the rights might be determined as a matter of substantive State Law". Deponent states affirmatively that this is not a statement of fact but merely a conclusion on the part of Mr. Rich and not binding on any party to the proceeding. As will be demonstrated in the memorandum of law to be submitted on this motion, the facts speak for themselves and no provision is contained in the plan which indicates any intention on the part of any of the parties to the proceeding to fix either the forum or the law to be applied in reaching a determination as to the parity question.

As part of the proceedings for the reorganization of The Prudence Company, Inc., proofs of claim were filed either by or on behalf of holders of guaranty claims in the proceeding. The form of the proof of claim and the procedure for the filing of such claim were fixed by order of the United States District Court for the Eastern District of New York in the proceedings for the reorganization of The Prudence Company, Inc., which order was dated August 16, 1935. The proof of claim filed by Burnside certificate holders set forth an unsecured claim against The Prudence Company, Inc. based on its guaranty of the payment of principal and interest on the Burnside certificates. Annexed hereto and

. narked Exhibit "A" is a photostatic copy of a typical proof of claim filed by the Burnside certificate holders in The Prudence Company, Inc. reorganization proceedings.

With respect to the dismissal of the Amalgamated Properties, Inc., reorganization proceedings and the entry of the [fol. 194] order closing the Burnside First Mortgage Participation Certificate Issue reorganization, the following facts will demonstrate the occasion and necessity for such order. Deponent as counsel for the two interested corporations, Prudence Realization Corporation and Amalgamated Properties, Inc., participated in the negotiations hereinafter set forth and is entirely familiar with all of such facts.

Included in the Prudence assets was a claim against Amalgamated Properties, Inc. on an intercompany account. Also included in the claims against Amalgamated Properties, Inc., was a claim of Reconstruction Finance Corporation for $7,800,000 together with accrued interest, based upon a note executed by Amalgamated Properties, Inc. which had been acquired by Reconstruction Finance Corporation. During 1940 negotiations were undertaken by Reconstruction Finance Corporation and Prudence Realization Corporation in an effort either to reorganize Amalgamated Properties, Inc. or to secure a dismissal of the proceeding so that the corporation might continue to function. By way of compromise and adjustment between those two parties, the claim of Prudence Realization Corporation against Amalgamated Properties, Inc. was assigned to a subsidiary of Reconstruction Finance Corporation and in exchange Prudence Realization Corporation secured certain assets. When such transfer and assignment took place, the only outstanding general claims against Amalgamated Properties, Inc. were owned by Reconstruction Finance Corporation or its subsidiary and that corporation was satisfied to have the proceedings for the reorganization of Amalgamated Properties, Inc. dismissed [fol. 195] so that the corporation could continue to function in the disposition of its remaining assets without court supervision. Plans of reorganization for the certificate issues owned by Amalgamated Properties, Inc. having been consummated, it was therefore necessary, in order to complete the dismissal of the proceeding, that such individual reorganization proceeding be closed. Upon that determination an order was entered closing the Burnside Certificate Issue

reorganization, such order being entered on December 27, 1940.

In the affidavit submitted by Mr. Frederic P. Rich in opposition to the instant motion, considerable emphasis is placed by him on the fact that the order dismissing the Amalgamated proceeding specifically reserved jurisdiction in the court with respect to the reorganization of the Zo-Gale Certificate Issue. The Zo-Gale Issue was also a Prudence-Bonds Corporation certificate issue which had been guaranteed by The Prudence Company, Inc. in the manner above described and title to the underlying real estate had been acquired by Amalgamated Properties, Inc. The manner of reorganization and the procedure adopted were similar to that in the Burnside Certificate Issue. However, in connection with such certificate issue, Prudence trustees also held a certificated interest of $816.67 and an uncertificated interest in the mortgage to the extent of $7,200. The trustee appointed upon the reorganization of the Zo-Gale Issue made application in the Federal Court in the consolidated proceedings for the reorganization of The Prudence Company, Inc., Debtor, and Amalgamated Properties, Inc., Debtor, for an order determining that the Prudence-held [fol. 196] certificates were subordinate to all other certificates. In that case, the reservation with respect to jurisdiction was similar to the one involved here. There, too, the provision was that the trustee was restricted in making payment on Prudence-held certificates until an adjudication had been made by "a court of competent jurisdiction." The Zo-Gale trustee made his application for such an order in the bankruptcy proceedings themselves as contrasted with the instant litigation which was instituted in this Court. That application made by such trustee was pending in the District Court in the proceedings above described at the time the Amalgmated proceeding was dismissed and the reservation set forth in Mr. Rich's affidavit was for the purpose of making certain that no question would subsequently arise as to the validity of the determination made by the District Court in that proceeding.

The affidavit submitted by Joseph W. Ferris, George L. Long and Henry Leifert as trustees purports to establish the existence of a triable issue of fact with a request that a trial be held instead of disposing of the legal question involved upon this motion. An examination of that affidavit shows that the basis of such trustees' opposition to the pres-

ent motion is an allegation contained in their complaint that the certificates acquired by The Prudence Company, Inc. were repurchased or exchanged for other investments pursuant to the agreement of guaranty and because said certificates were by their terms due and payable. This allegation is made upon information and belief by the plaintiffs and no supporting data is supplied in either the complaint [fol. 197] or in the affidavits submitted in opposition to this motion. In referring to the affidavit of William T. Cowin, President of Prudence Realization Corporation, submitted in support of this motion, the trustees take issue with Mr. Cowin's statement that the certificates were repurchased in the regular course of business by The Prudence Company, Inc. Although it is true that Mr. Cowin had no personal knowledge of how the certificates were acquired, the affidavit submitted by him states affirmatively that the details of the acquisition of the certificates are set forth in a schedule annexed to Mr. Cowin's affidavit and marked Exhibit "D" and that the information contained in said schedule was secured from entries made in the regular course of business as contained in the books and records of The Prudence Company, Inc., which are all in the possession and under sole control of Prudence Realization Corporation.

Mr. Cowin did state in his affidavit that The Prudence Company, Inc., as part of its regular business, bought and sold Prudence-Bonds Corporation bonds and mortgage participation certificates both before and after maturity and that before the sale and after the repurchase of such bonds and certificates, they were included in the balance sheets and published financial statements of The Prudence Company, Inc. as assets, and here again this statement is made by Mr. Cowin as appearing from The Prudence Company, Inc. books and records. There can be no question therefore as to any issue with respect to the facts appearing in such books and records and the information contained in Mr. Cowin's affidavit to the extent that they relate to the fore- [fol. 198] going presumed issue created by the trustees, is not based upon Mr. Cowin's personal knowledge and was never asserted to be so based.

The trustee's affidavit, however, concedes that they have no personal knowledge of the facts and circumstances surrounding the acquisition of the certificates but have been informed that these certificates were not acquired in the regular course of business and as an investment, but, rather,

were acquired by reason of the fact that The Prudence Company, Inc. was the guarantor. The source of the information upon which the trustees have formed this belief is not given, nor is the materiality of the fact that The Prudence Company, Inc. might have acquired the certificates because it was the guarantor demonstrated by the trustees, or that such fact would defeat defendant's motion or entitle the trustees to the judgment prayed for, and the Court has not been presented with such evidence as is required to convince it of the probable success of the trustees on this point. Annexed hereto and also to be submitted in reply to the affidavit submitted by the trustees in opposition, is an affidavit of Ira K. Balsam, presently an employee of Prudence Realization Corporation and who was also an employee of The Prudence Company, Inc. since 1925. As appears from Mr. Balsam's affidavit and from his knowledge and familiarity with the books and records of the company, the statement made in Mr. Cowin's affidavit with respect to the sale and repurchase of the certificates as part of the business of The Prudence Company, Inc., is verified, and it is submitted effectively disposes of any possible issue as to the facts and [fol. 199] circumstances surrounding the acquisition of certificates by The Prudence Company, Inc.

Moreover, as is demonstrated by the affidavit submitted by the Trustees, prior to January 1, 1932, upon amortization payments being received from the mortgagor, certificates in the Burnside Certificate Issue representing maturities were actually retired and the mortgage reduced. This is to be contrasted with the procedure adopted after January 1, 1932 where, upon reacquisition of the certificates by The Prudence Company, Inc., there was no retirement of the certificates and no reduction in the outstanding mortgage.

Deponent respectfully submits to this Court that of the three parties interested in this litigation as either plaintiffs or defendants claiming cross-relief against Prudence Realization Corporration, the trustees, whose first connection with the mortgage occurred only after the consummation of the reorganization of the certificate issue, are the only parties who assert that there is an issue of fact which requires a trial. The affidavit of Mr. Rich submitted on behalf of certificate holders who purchased their certificates long prior to the reorganization of the certificate issue or of The Prudence Company, Inc., Debtor, does not raise

controversial issues but submits the matter for disposition on this motion and actually seeks summary judgment in their favor against Prudence Realization Corporation. The requirement that this matter be tried is founded solely upon the trustees' affidavit which, as indicated above, asserts neither a denial of the facts set forth in the affidavit of Mr. Cowin and submitted in support of this motion, nor the source of the information upon which such trustees [fol. 200] have formed a belief with respect to the intention of The Prudence Company, Inc. in purchasing its certificates. Nor is there any evidentiary fact presented which even remotely indicates that Prudence Realization Corporation is not entitled to parity. Under all the circumstances outlined here and in the affidavits submitted in opposition, deponent is of the opinion that there is no triable issue of fact and that the matter may be disposed of by motion for summary judgment.

Wherefore, deponent prays that the motion made herein by defendant Prudence Realization Corporation for summary judgment shall be granted in all respects.

Irving L. Schanzer.

(Sworn to June 22, 1942.)

[fol. 201] Exhibit "A" Annexed to Reply Affidavit of Irving L. Schanzer, Read in Support of Motion

United States District Court, Eastern District of New York

In Consolidated Proceedings for Reorganization under Section 77B of the Bankruptcy A.

Nos. 27496 and 27028

In the Matter of The Prudence Company, Inc., Debtor

Proof of Claim

State of N. Y.,
County of N. Y., ss.:

On the 16 day of Oct. 1935, came Harold Ablowich of 110 W. 86 St. of N. Y. C., in the State of N. Y. and made oath and says:

1. That this claim is made in deponent's own behalf.

2. That this claim is made in behalf of Estate of Leonard J. Jacoby, of 110 W. 86 St. of N. Y. C.; that deponent is

executor of said estate, and is duly authorized to make this affidavit.

3. That the claimant was on February 1, 1935, the date of the approval of the petition for the reorganization of the Debtor herein, and still is, the lawful owner and holder of Prudence-Bonds Corporation mortgage participation [fol. 202] certificate(s), and, if the same be not registered, of the coupons appurtenant thereto, which mortgage participation certificate(s) are described as follows:

Serial Number	Interest Rate	Principal Amount	Name of Issue
697	5½	$100	Burnside
Total		$100	

the bond(s) and mortgage(s) referred to the said mortgage participation certificate(s) having been deposited with the Depositary or Depositaries therein mentioned; that in form, the Prudence Company, Inc. guaranteed payment of principal and interest as provided in an instrument executed by The Prudence Company, Inc. and deposited with the said Depositary or Depositaries; that the foregoing constitutes a statement of claimant's claim herein, and that the consideration therefor was the payment of moneys for the purchase of said mortgage participation certificate(s) by the claimant or claimant's predecessor in title.

4. Based upon the foregoing, a sum equal to the unpaid principal of said mortgage participation certificate(s) and the interest thereon to February 1, 1935, now unpaid, is justly owing from the Debtor to the claimant; that there are no set-offs or counter-claims to the same, but the claim is subject to reduction by any payments received on account of principal and/or interest on said mortgage participation certificate(s) subsequent to the filing of this proof of claim; that upon said indebtedness no note or other evidence of indebtedness, except as aforesaid, has been received, and no [fol. 203] judgment has been rendered thereon, and neither said claimant, nor to this deponent's knowledge and belief, has any person, by order of said claimant and to his use, had or received any manner of security for said indebtedness, except to the extent that the bond(s) and mortgage(s) deposited with the said Depositary or Depositaries as aforesaid, may be security for the said debt.

5. This claim is made by deponent as agent for the claimant for the reason that

Estate of Leonard J. Jacoby. By Harold Ablowich, Exec. (L. S.) Address to which all notices shall be sent: Same as above

Subscribed and sworn to before me this 16 day of October, 1935. Kathleen P. O'Donnell, Notary Public, Queens County, Queens Co. Clk's No. 3153, Reg. No. 7463. N. Y. Co. Clk's No. 259, Reg. No. 7-O-158. Term Expires March 30, 1937.

[fol. 204] In Supreme Court of New York, County of New York

[Same title]

Reply Affidavit of Ira K. Balsam, Read in Support of Motion

State of New York,
County of New York, ss:

Ira K. Balsam, being duly sworn, deposes and says:

That he has been in the employ of The Prudence Company, Inc. and its successors since March 1925; that as such employee he had charge of the records of Prudence-Bonds Corporation First Mortgage bonds and participation certificates, including the Burnside First Mortgage Participation Certificate Issue; and that he is familiar with the general books and records of The Prudence Companay, Inc.

That he compiled Exhibit "D" annexed to Mr. Cowin's affidavit submitted on this motion and that such Exhibit "D" was prepared from entries made in the regular course of business in the books and records of The Prudence Company, Inc. as is set forth in Mr. Cowin's affidavit.

That the entries made in the regular course of business in said books and records of The Prudence Company, Inc. show that both before and after January 1, 1932, The Prudence Company, Inc. acquired Prudence-Bonds Corporation mortgage participation certificates and bonds both before and after the maturity thereof.

[fol. 205] That of his own knowledge and as further appears from the entries made in the books and records of

The Prudence Company, Inc., it was the practice of The Prudence Company, Inc., prior to January 1, 1932, upon presentation of matured Prudence-Bonds Corporation mortgage participation certificates or bonds for redemption, to accept and make payment of such securities by check drawn by the cashier of The Prudence Company, Inc. Based upon the same knowledge and entries made in the regular course of business in such books and records, with respect to such securities submitted for repurchase prior to January 1, 1932 and prior to the maturity date of such certificates, it was the practice of the cashier to refuse to make payment of such certificates, but the customer presenting such securities was directed to confer with an officer of the corporation connected with the sales department to determine whether the certificate would be repurchased by the corporation.

On and after January 1, 1932, instructions were received throughout the corporation to the effect that no further payments would be made of principal with respect to certificates or bonds maturing January 1, 1932 or thereafter, except as hereinafter set forth, and except upon approval of an officer of the corporation, and that the eighteen months deferment for the payment of principal granted to The Prudence Company, Inc. under its agreement of guaranty was being invoked by the corporation. As to all securities submitted for payment to the cashier after January 1, 1932, such certificates were returned to the customer and he was advised as to the invocation of the eighteen months pro-
[fol. 206] vision. If the customer insisted on immediate payment of principal, he was directed to confer with an officer of the corporation for the purpose of ascertaining whether the certificate would be purchased by the corporation and if so, the price at which such repurchase was to be effected.

Based upon his personal knowledge and the practice evidenced by the entries made in the regular course of business in the books of The Prudence Company, Inc., deponent states that, with respect to certificates maturing January 1, 1932 or thereafter, the manner of repurchase of such certificates presented to the corporation for payment after January 1, 1932, was the same as that followed with respect to unmatured certificates presented for purchase prior to January 1, 1932. The sole exceptions consisted of

cases where the mortgagor fulfilled his obligation to make amortization payments to The Prudence Company, Inc. as servicing agent and where certificates were outstanding representing such specific amortization payments. In such cases, matured certificates were paid upon presentation.

Based upon his own knowledge and upon an examination of the balance sheets and published financial statements of The Prudence Company, Inc. before the sale and after the repurchase of Prudence-Bonds Corporation First mortgage participation certificates and bonds, such securities were included in the balance sheets and published financial statements of The Prudence Company, Inc. as assets.

Ira K. Balsam.

(Sworn to June 23, 1942.)

[fol. 207] In Supreme Court of New York, County of New York

[Same title]

Deposition of W. Allin Bigg

Deposition of Mr. W. Allin Bigg taken on behalf of the plaintiff for use on the motion made by the defendant Prudence Realization Corporation for summary judgment and other relief, held at Room 2004, No. 40 Exchange Place, New York, N. Y., on Monday, June 22, 1942, at 2:30 P. M., before Benjamin Zatz, Notary Public.

Appearances:

Charles H. Kriger, Esq., Attorney for Plaintiffs Joseph W. Ferris et al., 66 Court Street, Brooklyn, N. Y.

Messrs. Delafield, Marsh, Porter & Hope, Attorneys for Plaintiffs (in Action #2), 20 Exchange Place, New York, N. Y., by Frederic P. Rich, Esq. and Eugene Blanc, Jr., of Counsel.

Irving L. Schanzer, Esq., Attorney for Defendant Prudence Realization Corporation, 40 Exchange Place, New York, N. Y., by Albert J. Brauth, Esq., of Counsel.

Mr. Kriger: Notice of the taking of the deposition is waived by all parties, and

[fol. 208] It is stipulated that the testimony so taken may be used upon any trial of this action.

The subscription of the deposition by the witness is likewise waived.

Mr. Albert Freiberg, the attorney for Solomon Zauderer et al., authorized me to enter into this stipulation on his behalf.

(Witness sworn by Notary Public.)

W. ALLIN BIGG, having been first duly sworn by the Notary Public to tell the truth, testified as follows:

Direct examination.

By Mr. Kriger:

Q. Where do you live, Mr. Bigg?

A. I live at 100 Arthur Street, Ridgefield Park, New Jersey.

Q. At the present time you are connected with the Prudence Bonds Corporation?

A. Yes.

Q. That is not the defendant in this action?

A. No, sir.

Q. Now, you were at one time connected with the Prudence Company, Inc., were you not, Mr. Bigg?

A. Yes, sir.

Q. When was that?

A. From August 15th, 1919 to March 15th, 1938, when I resigned.

Q. Now with reference to the years around 1932—I am not trying to pin you down to any specific date—what was your connection with the Company?

A. I was Assistant Treasurer of the Prudence Company.

Q. How long were you Assistant Treasurer?

A. I don't know when I was made an Assistant Treasurer [fol. 209] of the Prudence Company, but I think I have been an officer since about 1920.

Q. Did you have anything to do with the sale of the Prudence Bonds certificates at that time?

A. I was an employee of the organization and it was part of my duties to help clients who came in to make investments.

Q. Were you familiar with the Burnside issue?

A. I know of such an issue, yes.

Q. Do you remember the offering sheet on that, Mr. Bigg? I show you a photostat copy of a paper, and ask whether that is the offering sheet on Burnside?

A. This is the photostat of the offering sheet; yes, sir.

Mr. Kriger: I ask that it be marked for identification.

(Photostat of offering sheet marked Plaintiffs' Exhibit #1 for Identification, 6/22/42, B. Z.)

Q. Certificates in the Burnside issue were sold through the Prudence Company office, were they not?

A. Yes, sir.

Q. And will you tell us what the practice was on the sale, briefly?

The Witness: What do you mean by "the practice"?

(Colloquy off the record.)

A. We would take an order for the purchase of the certificate, and then a certificate would be prepared and forwarded to the depositary of that issue for authentication, and that would then be registered in the name of the purchaser. [fol. 210] When the certificate was ready for delivery, it would be picked up in the usual course of business and then delivered either to me in the New York office or to the Cashier's Department in the Brooklyn office, and then delivered to the client.

Q. Now, prior to January 1st, 1932, was it the practice of the Prudence Company to repurchase its own certificates?

A. Yes, sir.

Q. Such certificates, whether in Burnside or other issues, were repurchased by the Company from time to time; is that right?

A. We repurchased everything that we sold.

Q. What was their practice?—First, let me ask,—did they have a definite practice?

A. Yes, sir.

Q. What was that?

A. The regular practice was to loan on the securities up to ninety per cent of their par value, or repurchase the certificate at a discount consistent with the general conditions,—and usually it was at about ten per cent.

Q. Were certificates purchased from brokers prior to January 1st, 1932?

A. Occasionally; yes, sir.

Q. Was it the general practice to buy them, or were such purchases discouraged?

A. No, that is not true. We tried to discourage any dealings with the brokers, preferring to deal with our clients direct.

Q. Was there to your knowledge at any time a circular issued by Prudence stating that it would make an effort to repurchase certificates at a discount of one per cent?

A. That was part of the statements that we used to print.

Q. And statements were issued from time to time for certificates; is that correct?

A. Yes.

Q. Now, when a certificate was repurchased—I am still speaking of the period prior to January 1st, 1932 and about [fol. 211] a non-matured certificate—what was the practice of the Company with respect to that certificate?

A. The certificate not having matured, the said certificate which was repurchased would be forwarded to the general depositary in order to establish a credit for the reissuance to some new purchasers.

Q. No certificate was issued in the name of Prudence Company though?

A. Not to my knowledge; no, sir.

Q. But the credit was used in order to issue certificates to outsiders?

A. That is what I just said.

Q. Yes. Now are you familiar generally with the acquisition of certificates in the Burnside issue?

A. If that is the same as all other issues, I am.

Q. Are you familiar with this paper which is entitled "Exhibit D" in the defendants' motion for summary judgment, Mr. Bigg?

A. I didn't prepare it but I can read it.

Q. Now, speaking of a period subsequent to January 1st, 1932, can you state when the Prudence Company—I withdraw that.

Q. Do you know whether the Prudence Company ever passed any resolution invoking the eighteen months' clause?

A. Yes, they did.

Q. And do you know when that was?

A. Well, the clause was invoked as of January 1st, 1932, but I don't know the exact date that the Board of Directors passed that resolution.

Q. Do you know whether any resolution was ever adopted with respect to acquiring the certificates after January 1st, 1932,—any specific resolution with respect to the practice to be followed on acquiring certificates?

A. I do not know.

[fol. 212] Q. Was there any general practice adopted by the firm with respect to acquiring certificates after January 1st, 1932?

A. Yes, sir.

Q. Will you state what that practice was?

A. The general practice at all times was to maintain the good will of the client, and if a certificate holder or a bondholder came in with a bond or a certificate that had not matured we, of course, had no obligation to purchase that at the time because conditions were drastically different in 1932 than they were in 1925 or some other year. If, however, the client expressed and showed that they were urgently in need of money, we would give consideration to the repurchase of the security.

If the certificate had matured and they came in and presented the certificate for payment, we would try to have them take some other security in exchange for it of a later maturity date. There were many cases, of course, where certificate holders took that;—some cases where they wanted part cash and we would give them part cash and a new investment for the balance;—and there were some cases where the certificate holders had an urgent need for the entire amount of the certificate,—and cases of that type would be reviewed by a sort of a committee of three of us in the office, as to whether the need was in our opinion legitimate and, if so, the certificate was reacquired. That generally explains our policy.

Q. Well, if a person came in with a matured certificate, would he always be given another investment upon his request?

The Witness: Upon his request?

Mr. Kriger: Yes.

A. Surely.

[fol. 213] Q. Did you have any threatened law suits with respect to the Burnside in or about 1932?

A. I don't know sir.

Q. Was the Burnside issue regarded as a good investment in July of 1932?

Mr. Schanzer: I object to that.

Q. (Continued:) By Prudence Company?

The Witness: Can I answer the question?
Mr. Kriger: Yes.
The Witness: I heard the objection.

(Colloquy off the record.)

A. I can't answer the question.
Q. Didn't you ever discuss this matter with others in Prudence Company about that time?
A. If you will go back to your question, I am sure you will find out why I can't answer it. Your question was whether it was considered a good investment by the Prudence Company,—and I am not the Prudence Company; I am just an employee.
Q. Perhaps I will have to break my question down: Did you ever discuss it with any of the other officers, Mr. Bigg?

The Witness: As to whether it was a good—or was not a good investment?
Mr. Kriger: The general question as to the value of the certificates?

A. I don't know that that particular certificate would stand out from any other certificate we ever had.
Q. Do you recall that the Burnside issue became due in July 1932?
A. It matured in July 1932.
[fol. 214] Q. At that time the owner was in default?
A. From memory, I don't know, except I know the mortgage was not paid off, so it must have been.
Q. Can I refresh your recollection that the owner failed to pay an installment of principal on January 1, 1932?
A. It wouldn't mean a thing to me.
Q. And a deed was acquired in June 1932 by the Amalgamated Properties, Inc.?
A. I don't know from memory without examining the records.
Q. Now if you will look at the paper which I have described as Defendant's Exhibit D for use on the summary judgment motion, you will note that a number of certificates are shown to have been exchanged for other securities?

A. Yes, sir.

Q. Are you familiar with the other securities referred to in the fourth column?

A. I know the names of these as being Prudence issues; yes, sir.

Q. The certificates there were issued from what sources? I am referring now to the certificates.

A. From unsold balances in these mortgages.

Q. Are you familiar with 1081 Park Avenue?

A. I know the loan; yes, sir.

Q. Are you familiar with the 6th Avenue and 55th Street?

A. Yes, sir.

Q. Were those all later maturity dates?—that is, when I say later, I mean after.

A. I presume they would have to have been.

Q. Do you know whether 6th Avenue and 55th Street was a good mortgage or not?

A. I know it was subsequently paid off in full.

Q. Do you know whether 1081 Park Avenue was a good mortgage?

A. That I do not remember. I don't think it had been paid off before.

Q. Are you familiar with the Kew Garden Apartments?

A. Well, I make the statement now,—if you are going [fol. 215] to ask my familiarity with all of them,—all I can say is that I know these are Prudence issues. If you are going to ask me with relation to all of them, I will have to refer to the ledger records.

Mr. Kriger: May we have those?

(Colloquy off the record.)

Mr. Kriger: We will continue until he gets those.

(Further colloquy off the record.)

Q. Are you familiar with the so-called Pender-Buckbee-Merriam account?

A. I know something about the account; yes.

Q. When was that created?

A. (No answer.)

Q. Well, it was prior to June of 1932, wasn't it?

A. Yes.

Q. That was created for the purposes of buying certificates at less than par on the market?

Mr. Schanzer: Wait a minute—isn't he your witness? Are you going to lead him?

Mr. Kriger: Do you object to that?

(Colloquy off the record.)

Q. Do you know what the purposes were—why they created that?

A. No, I don't know.

Q. That wasn't an account created by the Company itself, was it—or was it not?

A. I know what it was used for, but I don't know why it was created.

Q. All right—tell us what it was used for.

A. It was used to purchase securities through—as I would call it—from the Street, rather than through a bondholder. [fol. 216] Q. Was that done so the bondholders wouldn't know that Prudence was buying it?

A. No, generally done because the securities could be purchased from brokers at rather substantial discounts.

Q. Would you say that that account was created before or after January 1, 1932?

A. My general recollection is it was created within the first three months of 1932. I think the account was closed out early in 1933.

Q. Now these certificates that were acquired in Prudence as shown in Exhibit D, what was the practice with respect to those certificates when they were acquired?

(Colloquy off the record.)

A. Well, if the certificate had matured, there was no need of sending it down for cancellation because the mortgage hadn't been paid off, so the certificates would be kept on hand in the office—in the vaults.

Q. Are you familiar with the Company's bookkeeping practice with respect to these reacquired certificates from July 1932 until March 1933?

A. Well, I was in charge of the Accounting Department of Prudence Company from November 15th, 1934 on—and in the course of my duties I had the general knowledge of how things were handled, naturally.

Q. Now between June of 1932 and March of 1933, was any interest credited to the Prudence Company on account of any of these certificates referred to in Exhibit D? Before

you answer, if you want to look at the books and refresh your mind, I am sure Mr. Schanzer——

[fol. 217] A. (Interrupting) I wouldn't know from memory, sir, and it wouldn't be a case of looking in one little place to get that answer.

Mr. Kriger: Would you concede that that was so?

(Colloquy off the record.)

The Witness: I have the mortgage ledger here now—and it appears that the interest due from the mortgagor on July 1, 1932 was not paid on the date it was due; neither was the interest paid when it was due on January 1, 1933.

Q. Was the interest paid on January 1st, 1932?

A. It must have been or otherwise it would have been set up on the ledger as having been due. This is the ledger that *were* set up to show all these *is* at the time this ledger was created by virtue of the regulations of the Banking Department in March of 1933—and we had to go back on each account and set it up for any arrears. The interest that was due March, 1932, on behalf of certificate holders was paid, because the ledger shows that the Prudence Company advanced $3,048 for itself.

Q. You mean other than itself?

A. I would think so—and as far as the January 1933 is concerned, there was an advance made of $17,200 for the payment of the interest that was then due.

Q. You mean the owner paid the difference?

A. No, that was owner evidently not having paid anything at the time this was set up. The differences there undoubtedly being due to the fact that they had made some collections from the owner—there was an assignment of [218] rents here and some of the assignment of rents was allocated.

Q. Was any money credited to the Prudence Company?

A. In connection with these two payments only, you mean?

Q. Yes.

A. There is nothing on this ledger—but why advance it to ourselves, from an accounting standpoint?

Q. Mr. Bigg, I am only asking what the record shows?

A. Then I have already answered.

Q. We aren't going to enter into any argument about what was done or should have been done. There is no entry made?

A. On this particular ledger sheet, no.

Q. Is there any entry made with respect to Prudence Company certificates on any other book of the corporation?

A. There should be; yes, sir.

Q. What would that be in?

A. In a separate book, as to whether they received interest. You see, the policy is slightly different—if you want it on the record—if not, I don't care——

Mr. Kriger: Well, I don't care—all right; we will take it on the record.

The Witness: Taking this period in 1932, after the eighteen months' clause became operative, there is—from an accounting standpoint, we paid out the interest that was due to the individual certificate holders other than the Prudence Company. There is no need of paying any moneys to ourselves, because we had received the money. As far as we were concerned, we didn't have special, as we called them, agency bank accounts at that time.

[fol. 219] Now, in March 1933, when the Superintendent of Banks issued regulations, it was necessary for us to keep these moneys received into specific agency accounts, and when an interest payment was then made on the basis of the funds available,—on the basis of the certificates outstanding—Prudence Company would receive its payment just the same as any other certificate holder would receive.

Q. Now Mr. Bigg, with reference to the certificates given to the certificate holders in exchange for Burnside certificates and shown on that Exhibit D, to whom was the interest paid, if any was paid, on the unissued portion?

A. There isn't any doubt in my mind that it was paid to the Prudence Company, Inc. after the banking regulations——

Q. (Interposing) No, I am referring now to the period prior to 1932.

A. In fact, I can say there was no need of paying it to ourselves.

Q. No, I am referring to the certificates which were exchanged for Prudence, such as the 6th Avenue and 55th Street, referred to in that schedule.

A. 6th Avenue and 55th Street has nothing to do with the Burnside. There would be separate ledgers.

Q. Have you got those ledgers?

Mr. Schanzer: I will make the same objection, that it is immaterial, but if you want that, I will get it.

(Colloquy off the record.)

The Witness: 6th Avenue and 55th Street was paid off. [fol. 220] Q. I mean, prior to July 1, 1932, the question was to whom interest was paid on unissued portions of that mortgage?

A. There was no need of actually paying it, if the Prudence Company had the unissued on hand; if the mortgagor paid the interest that was due, we didn't have to draw any checks. If we received the full interest that was due and only three-quarters of the issue had been sold, we would pay out interest on the three-quarters to the certificate holders, and the balance we would keep ourselves.

Q. Now, so I understand. That was true with respect to all the certificates referred to in Exhibit D?

A. It was true to every certificated issue that we handled.

Q. Now, all these issues referred to in the fourth column of Exhibit D were not in default in July of 1932, were they—were they not?

A. They were not all in default? I don't know if there were any of them.

Q. There were none of them?

A. That I can't tell without looking at the ledger. It is ten years.

(Colloquy off the record.)

The Witness: (examining ledger): Now, which issue do you want?

Mr. Kriger: Suppose we start at the beginning and take "Jacellen".

Mr. Schanzer: That was not in default.

The Witness: It was not in default.

Q. Has it since gone into default?

A. Not to my knowledge.

(Further colloquy off the record.)

Mr. Kriger: That's all, Mr. Bigg.

[fol. 221] Mr. Rich: If you have no objections, we would like to ask a few questions.

Mr. Schanzer: Go ahead.

Mr. Rich: Can we stipulate that on the record?

Mr. Schanzer: There is some question whether properly you can go ahead in view of the fact that you submitted your affidavit to the question that this is going to be submitted, if there is going to be a trial.

Mr. Rich: Since we filed our affidavit, we have talked the thing over with Mr. Kriger and we think maybe there are some facts we ought to develop here.

Mr. Schanzer: Go right ahead.

Direct examination (continued).

By Mr. Blanc:

Q. When a security—a certificate was reacquired by the Company either through any of the methods that show on this Exhibit D, did the Prudence Company set up on its books anything that would correspond to an interest receivable account to show that there was interest accruing on that security and due to the Prudence Company?

A. We didn't keep our books on that basis as far as interest was concerned, but we would show interest due from the mortgagor for the full amount of the mortgage, not a separate classification for investments or things of that nature.

Q. There was no such account showing interest in which you credited yourself for interest received as you would on any other security that would have been purchased?

A. Not as such. We had a record of the certificate.

[fol. 222] Q. In other words, you could calculate;—there was no interest receivable account to reflect accruals on securities that were purchased?

A. No, sir.

(Colloquy off the record.)

Mr. Schanzer: Do you want to amplify your answer?

Q. That practice continued the same, both before and after the banking holiday?

A. So far as that account called "interest receivable" on our own investments, yes.

Q. Mr. Bigg, are you familiar in a general way with the financial condition of the Prudence Company in the early part of 1932? From the books?

A. Of course I saw their financial statements, naturally.

Q. You did see the financial statements

A. Yes, sir.

Q. Do you know whether or not the Prudence Company applied for a loan from the R. F. C.?

A. I know they applied and they got it.

Q. When was the application, do you recall?——

Mr. Blanc (to Mr. Schanzer): Or will you concede, Mr. Schanzer, that it was February 16, 1932?

Mr. Schanzer: As a matter of fact, they opened negotiations in November of 1931.

The Witness: November of 1931,—that is what I was going to say—got it in two chunks.

Q. And the application was for $25,000,000?

A. My knowledge was $20,000,000.

Q. The amount received was $20,000,000?

A. I didn't know the application was for a greater amount than they received.

[fol. 223] Q. You know the amount they received was $20,000,000?

A. Yes.

Q. Do you know what documents were attached to the loan?

A. The loan, I think, speaks for itself; what the loan was and what the collateral was,—it is listed all in the note.

Q. Do you know what the maturities were that Prudence Company was faced with in 1932?

A. From memory I don't know; no, sir.

Q. Do you recall whether there were many maturities in 1932?

A. I know they were greater in January, 1932 than they were in February or March,—and I know April was heavy.

Q. Do you know whether there was sufficient cash to pay those?

A. That I don't know.

Mr. Schanzer: Why don't you specify the time?

(Colloquy off the record.)

Q. Either before or after?

A. I don't know; honestly.

Q. What was the occasion for the R. F. C. loan?

A. Well, I should imagine to keep on paying the interest in view of the general economic condition, and also for us to keep on as a going concern.

Q. Did any of the proceeds of that loan go through the Pender-Buckbee-Merriam account?

A. I don't know; honestly.

Q. You don't know whether any certificates were purchased after the loan through the Pender-Buckbee-Merriam account?

A. I know certificates were purchased through the Pender-Buckbee-Merriam, as well as bonds being purchased.

Q. After the loan?

A. After the loan, but I don't think any of the money [fol. 224] that came in after the loan went in as a deposit in the Pender-Buckbee-Merriam.

Q. Where did the moneys come into that account?

A. From the Prudence Company.

Q. Any specific source?

A. No, our detail was merely this:—This brokerage house—I can't remember the name—Ed Luce was there——

(Colloquy off the record.)

A. (Continued) Well, this firm down here in the street merely knew the account on their books by a number. If they bought securities, they charged it to this account number,—we will say fifteen,—and to my knowledge nobody in their office knew who the real persons were behind the account. Then the securities would be delivered most of the times to me, and I would draw a check to the order of Pender, Buckbee, Merriam, and credit it to the Pender, Buckbee, Merriam account. Then the Pender, Buckbee, Merriam would draw its check, which would be the same amount for the check that I drew. There may have been a balance of a couple of hundred dollars in the account, but I don't think it was at any time substantial.

Q. When a security was repurchased,—the certificate was repurchased by the Prudence Company, what documents were drawn? Did you have any——

A. We took an assignment.

Q. I meant from the bookkeeping point of view, you had a debit ticket?

A. You don't call that a document? Do you?

Q. No,—that is the type of thing I am referring to.

A. You want to know what the procedure was to purchase a certificate?

[fol. 225] Q. Right.

A. After the approval was granted, we would prepare a debit ticket, which is merely a voucher authorizing the drawing of a check,—and that voucher would have to be approved by an officer. The check was then drawn by the Prudence Company, and that voucher accompanied by the bond would go in to the cashier. The cashier would then initial on the bottom of that voucher alongside of a rubber stamp impression that we put on there "bond received" so that we would then charge that particular cashier with having that particular numbered bond on hand,—and that was true in all of our offices.

Q. Now, did the debit tickets show the nature of the purchase,—that is whether it was——

A. (Interposing) In some cases we would put some information on there to indicate to the officer in charge that it was what I say——

Q. (Interposing) Distress?

A. Case of distress, need of money, or partial reinvestment and cash out.

Q. Did some of those have statements like "compulsory repurchase"?

A. I don't think on certificates. That was true only on Prudence bonds.

Q. What was the meaning of the notation "compulsory repurchase"?

Mr. Schanzer: I am going to object to it on the ground that he has already testified that it did not take place with respect to the certificates.

Mr. Blanc: He said he didn't remember.

Mr. Schanzer: You would have to call another witness. He can't annswer it.

[fol. 226] Q. What was the meaning of the notation "distress"?

A. A person was urgently in need of money, and that the item had been approved by this little officers' committee for payment.

Q. Were there any other types of notation that you put on the debit tickets?

A. Yes,—we had some where we were only purchasing a certificate in part, and there we would say "partial re-

purchase and investment for the balance." That was used in order to make up our weekly sales reports.

Q. After January 1, 1932, Mr. Bigg, was it the practice of the Company to purchase all matured certificates that were presented for payment?

A. No, we tried to have them reinvest,—the same as we did prior to January 1, 1932. That was our first obligation—to keep the client. A man wouldn't just walk in the office and plank down his bonds and walk out with the cash.

Q. So that you would attempt to have him reinvest?

A. That's right.

Q. And if he didn't want to reinvest, was it the practice of the Company to purchase his securities that had matured?

A. After January 1st, 1932?

Q. After January 1st, 1932.

A. No.

Q. What did you do then?

A. We told him that the Board of Directors had passed this resolution. That they had invoked this eighteen months' clause,—and that he would have to wait eighteen months for the payment of his principal, but that he would get his interest on the regular dates, the same as before.

You might bring up the question,—he didn't want that; so if I can anticipate your next question, he would probably want some cash and partial reinvestment.

[fol. 227] Q. If the client insisted, it was your practice to give him part cash and part reinvestment?

A. That's right.

Q. If he insisted on cash, you would give him part cash and part reinvestment?

A. That's right; sometimes we couldn't even talk him into that. He still would want the money.

Q. And then you would simply refuse?

A. By no means. We would discuss it with this committee, as to whether or not we would repurchase the certificates. In some cases it would be repurchased at five or six or seven, or sometimes even ten per cent discount.

Q. And then the committee might approve a purchase at a discount if the customer insisted on cash?

A. That's right;—and if the customer had, in the opinion of this committee, not an urgent reason for cash, we might

refuse to purchase at all. He might have to wait his eighteen months.

Q. In other words, you might refuse to give him any cash?

A. We did; yes.

Q. In this Exhibit D, where there were statements of purchase at par flat, does that mean the customer took the face amount and waived the interest?

A. That's right.

Q. In other words, those were purchased at a discount amounting to the accrued interest?

A. That is correct.

Q. And the only cases on that Exhibit D that represent payment in full is where the notation is "par plus accrued interest"?

A. I didn't prepare that.

(Colloquy off the record.)

Q. Mr. Bigg, do you know whether or not Prudence Company ever passed any corporate resolution authorizing the [fol. 228] setting up of the Pender-Buckbee-Merriam account?

A. No, I don't remember at all.

Q. Were agency accounts set up for the certificate issues after the banking holiday?

A. Yes, as well as all of the bond issues.

Q. As well as for the bond issues. And that is a separate agency account for each certificate issue?

A. Oh, no.

Q. What was the practice? Will you describe the setting up of the agency accounts for the certificate issues then?

A. My memory on that is that we had quite a few Prudence Company, Inc. agency accounts, and that we would use the most immediately adjacent banks for the original deposit,—and then as funds accumulated in large amounts, they would be transferred to other accounts,—other agency accounts.

In other words, we had the Bank of the Manhattan Company in our building at 43rd Street, and if we had an account here, it would be foolish to chase boys down every day, so we would clear in the accounts of the adjacent banks and transfer moneys to these other accounts,—but we didn't have only one agency account.

Q. Did you segregate the money from each certificate issue to those received from any other issue?

A. Not to my knowledge. All went into these agency accounts.

Q. Do you know the date of the assignment of rents in the Burnside issue? Does that show there?

A. It was June 14th, 1932, wasn't it?

(Witness peruses records.)

The Witness: Title passed in June 13th, 1932, and the [fol. 229] assignment of rents was made February 7th, 1934, effective from March 4, 1933.

Mr. Kriger: That was the assignment of Amalgamated?

Mr. Schanzer: That's the only assignment of rents.

(Colloquy off the record.)

Mr. Kriger: I want to ask one more question. Shall I ask it now?

Mr. Blanc: Yes.

By Mr. Kriger:

Q. Referring to the deliveries in the Pender-Buckbee-Merriam account, where were those deliveries made to you?

A. At 331 Madison Avenue, New York City.

Q. By whom?

A. By a representative of this firm.

Q. The broker or the bank?

A. No, the broker—McWilliams, Wainwright & Luce—that's the name of it.

Mr. Rich: McWilliams, Wainwright & Luce.

Q. To whom were the deliveries addressed?

A. I don't even know to whom they were addressed. The fellow was so accustomed to come in and see me.

Q. The reason is, you have testified that nobody in the broker's company knew?

A. That is the bookkeepers in their office.

Q. That is, the fellow knew?

A. Oh, yes; this Mr. Luce knew.

[fol. 230] By Mr. Blanc:

Q. Mr. Bigg, I want to be clear on one thing: Around January of 1932, as I understand it, the Prudence Company

would collect from the mortgagor and then they would compute on the outstanding certificates the interest that was due on any particular interest maturity date?

A. That was always true; not only January 1, 1932.

Q. Yes; I mean up to that?

A. Up to that, those interest payments were made in full to the certificate holder.

Q. Those interest payments up to that were made in full to the certificate holder irrespective of the amounts collected from the mortgagor?

A. That's right.

Q. That means, if there was a deficiency in the amounts collected, that the Prudence Company would have advanced that deficiency?

A. That's right.

Q. And conversely, that if there was more collected, the balance would remain in Prudence Company general funds —in their general account?

A. That's right.

Q. That was the way it was done?

A. That's right.

Cross-examination.

By Mr. Schanzer:

Q. Mr. Bigg, after March 4th, 1933, the banking regulations were placed in effect by the Banking Board of the State of New York, and were applied to the Prudence Company; as I understand it under those banking regulations, Prudence was precluded from making any payments on any of its guarantee obligations except to the extent to [fol. 231] they received funds from the owner of the property or from operations of the property?

A. That's right; one of the restrictions provided that you could not advance any corporate funds, and that payments could only be made from money collected?

Q. After March 16th, 1933, when the Prudence opened for business, when moneys were collected where were they placed?

A. In the agency accounts.

Q. In making distribution on the outstanding certificates, were all the payments made solely to the public holders of certificates, or were the interest payments distributed between the public holding and certificate holders?

A. They were distributed between both, and moneys due on the Prudence Company, Inc., certificates—they were placed in a special account.

Q. That was true whether the mortgagor paid the full amount of interest or less?

A. It was true on all certificates we had.

Q. If a $10,000 payment was due and the owner only paid $5,000, fifty per cent would be paid out on the publicly held certificates and fifty per cent on the other?

Mr. Kirger: I don't want to make any objection. You are talking now of payments made on Burnside?

Mr. Schanzer: I may say this was a general practice.

Mr. Kriger: That's all right.

(Colloquy off the record.)

Q. And with respect to the Burnside certificates, would [fol. 232] you have any way of advising yourself right now as to what was done with respect to those?

A. Yes, sir.

(Witness refers to records.)

The Witness: I have looked on the ledger and I have seen several indications of the payment of interest.

Q. On those specific certificates after March 1st, 1933?

A. That's right.

Mr. Kriger: May I ask that they be read into the record? You don't mind my breaking in now?

Mr. Schanzer: No.

(Colloquy off record. Witness gets data.)

The Witness: First interest payment after the banking holiday was February 8th, 1934.

Mr. Kriger: And the amount?

The Witness: The amount was fifty cents for a $100 certificate.

(Further colloquy off the record.)

The Witness: The payments after that were as follows:

June 8th, 1934	55 cents
May 9th, 1935	$1.00
December 11th, 1935	$1.15
May 5th, 1936	80 cents

September 12th, 1936	$1.00
February 19th, 1937	$1.10
July 22nd, 1937	$1.25
November 12th, 1937	$1.40
August 30th, 1938	$1.60

That's the last one.

(Colloquy off the record.)

[fol. 233] Q. With respect to the payments received by the Prudence Company prior to February 1st, 1935, into what account did the Prudence Company place those?

A. Its own corporate account.

Q. As to the payments made after February 1st, 1935, where were those funds deposited by the Prudence trustees?

A. They were deposited to the best of my recollection in its corporate funds but set up in a special reserve.

(Further colloquy off the record.)

The Witness: Prior to January 1st, 1932, any interest received from mortgagors was deposited into the corporate accounts of the Company and a transfer of funds would be made to an interest account representing the amount of checks drawn for the interest to be paid to the publicly held certificate holders. There was no need of drawing a separate check to the Prudence Company, because the money was already in its own corporate account.

Subsequent to the establishment of the agency accounts, and prior to February 1st, 1935, when the trustees were appointed, the books and records were generally under the supervision of the Banking Department of the State of New York. Payments of interest received from mortgagors were paid to the—all certificate holders, whether publicly held or not—and the amount of money due to the Prudence Company, Inc., on the certificates it owned were then drawn from the so-called agency accounts and placed into the corporate funds of the Company.

[fol. 234] After February 1st, 1935, the date of the appointment of the trustees, the moneys were withdrawn from the agency accounts and a separate liability reserve was created on the books for the amount of the interest received on certificates that the trustees owned.

I think that's the whole statement.

Q. That last special account created by the trustees, was that voluntary on their part?

A. Yes, sir.

Q. Was that for the purpose of determining what the further rights might be at some later time?

A. I don't know the purpose of it, except that I was instructed to keep all such moneys in a separate account in order to have a complete record of the payments received.

Q. Subsequent to June 1st, 1932, and prior to the banking holiday when Amalgamated Properties, Inc., defaulted in making its interest payments, how did you treat a default on Prudence's books? How was that set up?

A. No different than any other account, as far as we were concerned.

Q. An account receivable?

A. We would charge Amalgamated for the amount due on the mortgage on the books of our corporation here.

Q. That was true with respect to any other obligations which Amalgamated owed Prudence?

A. That is correct.

Q. Treated the same as a first mortgage or a second mortgage which Prudence held owned by Amalgamated?

A. That's right.

Q. After January 1st, 1932, I think you have already testified that in many instances Prudence, through its committee, refused to make payment of the principal amount [fol. 235] of certificates which had matured, and advised the certificate holder that the eighteen months' clause would be invoked?

A. Yes, sir.

Q. That was true only with respect to certificates, not with bonds?

A. No.

Q. With bonds as well?

A. The eighteen months' clause was true on the bonds as well as the certificates.

Q. With respect to the practice on reacquisition of certificates in the Burnside certificate issue, is there anything which distinguishes the repurchase of these certificates from the repurchases of Zo-Gale certificates by the Prudence Company?

Mr. Kriger: I am going to object to that. I should object not only on the matter of form but because you are asking the witness to express an opinion.

A. The Burnside was just the same as any other issue, and we didn't care what particular issue a client had—if it matured, we tried to have him reinvest it.

Q. So actually, from the point of view of our answers to Mr. Kriger's questions and Mr. Blanc, all of the testimony that you have given is true generally of all of the reacquired certificates?

Mr. Kriger: I give notice that I shall object both as to the form and substance.

A. Very definitely understood.

Q. Were the purchases of the Zo-Gale certificates similar in all respects with the purchase of the Burnside certificates as to circumstances?

[fol. 236] Mr. Kriger: The same objection.

A. Absolutely; right.

Mr. Rich: We will make the same objection.

Mr. Schanzer: That's all.

(Colloquy off the record.)

Redirect examination.

By Mr. Blanc:

Q. Mr. Bigg, did you testify in the Zo-Gale parity proceeding?

(Further colloquy off the record.)

A. I don't even remember.

Mr. Blanc: I would like to ask a question on the record, whether Mr. Schanzer will stipulate that there was no testimony on this Zo-Gale parity proceeding?

Mr. Schanzer: The record speaks for itself.

By Mr. Kriger:

Q. Mr. Bigg, between July 1st, 1932 and March 1st, 1933, were there any interest distributions to certificate holders on the Burnside issue?

The Witness: July 1st, 1932?

Mr. Kriger: July 1st, 1932 and May 1st, 1933—March 1st, 1933, rather.

A. Well, the interest on July 1st, 1932 was paid to the certificate holders and so was the interest on January 1st, 1933, [fol. 237] because the eighteen months' clause was still running.

Mr. Schanzer: Do you mean was the interest collected from the mortgagor and paid out, or was it paid by Prudence under its guarantee?

Mr. Kriger: Yes, it was paid by Prudence.

Q. Was it collected from the mortgagor?

A. Not in full, sir.

Q. Did Prudence have knowledge in June of 1932 that the owner was going to default on the payment of principal on July 1st?

Mr. Schanzer: I object to the question on the ground that it is incompetent. He can't tell.

(Colloquy off the record.)

A. I have no knowledge whether they knew it. The record shows that they took title to the property in June of 1932.

Mr. Schanzer: You can draw your conclusions.

Mr. Blanc: We will draw them.

Q. When you stated in answer to Mr. Schanzer's question that a segregated account was set up by the Trustees as a voluntary act, what did you base that statement—rather, the use of the word "voluntary" on?

A. I worked for this company a good many years and was talking with counsel on it, and used the word "voluntary" as to my knowledge there was never any order of the court directing that such an account be established.

[fol. 238] Q. Didn't some certificate holders claim that some of the certificates held by Prudence were not entitled to interest?

A. I don't know that of my own knowledge.

Q. Actually, wasn't that the reason that these segregated accounts were set up, because there was a claim that Prudence was not entitled to this interest?

A. I don't know that of my own knowledge.

Q. You don't know what the basis was for setting up the account, Mr. Bigg?

A. No, other than setting up a separate record.

Q. When you used the word "voluntary" you intended by that that there was no court order requiring that the account be set up in the segregated form?

A. That's right.

Mr. Kriger: That's all.

(Deposition concluded at 4:15 P. M.)

SUPPLEMENTAL DEPOSITION OF W. ALLIN BIGG

July 3, 1942, 3:10 P. M.
Room 907, 10 East 40th St., New York, N. Y.

APPEARANCES:

Irving L. Schanzer, Esq., of Prudence Realization Corporation;
Charles H. Kriger, Esq., attorney for Joseph W. Ferris, et al., Trustees;
Frederic P. Rich, Esq., attorney for City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees, etc.
W. Allin Bigg, witness.

[fol. 239] (Continuation of examination of W. Allin Bigg.)

Mr. Rich:

Q. Mr. Bigg, can you explain how it came about that the Prudence Company acquired approximately one-third of the outstanding certificates of the Burnside issue?

A. I can't explain. I don't know whether they acquired it or not; but how we acquired all of the certificates was several different fashions, one of which was to repurchase the certificate direct from the bondholder or the certificate holder; another would be to repurchase part of the security and give a new security for the balance. Another might be the purchase through the so-called Pender, Buckbee, Merriam account.

Q. Can you explain the occasion for the acquisition of the certificates?

A. I think it was the natural course of events. As I recall, that certificate issue matured July 1, 1932; that was the final maturity of the mortgage. It was our general practice, some three months before the maturity date of a mortgage, to take the names and addresses and the amounts of all of the outstanding certificates and prepare lists for the various salesmen. These salesmen would then solicit these people in regard to reinvestment of the funds which were coming due on July 1, and I think a goodly portion of the certificates were acquired in that manner.

Q. Was it the practice of Prudence Company ever to make such a solicitation with respect to any certificates which were not about to mature?

A. No, because there would be nothing to reinvest if it had not matured or was not about to mature.

[fol. 240] Q. You have testified that in some instances the certificates were acquired as a result of the salesmen soliciting the certificate holders to exchange their certificates. What was the fact with respect to the other certificates acquired by The Prudence Company at that time?

A. Certificates of other issues, you mean?

Q. Certificates of this issue. Except for the certificates acquired through the Pender, Buckbee, Merriam account, were the other certificates asquired as a result of the presentation of certificates to The Prudence Company by the certificate holders with requests for their payment?

A. No, not necessarily. Just because the certificate was reinvested is no proof that the certificate holder demanded the payment of the certificates.

Q. Were there any instances in which the company initiated the acquisition of the certificates, except in those instances where the salesmen were sent out to acquire the certificates about to mature?

A. We did it in every issue.

(Discussion off the record. Question repeated to the witness.)

A. No, not necessarily.

Q. Except in the case of the certificates which were acquired by The Prudence Company through their salesmen, which you described, and except for the instance where the certificates were acquired through the Pender, Buckbee, Merriam account, were any of the certificates acquired by The Prudence Company acquired as a result of the Prudence

Company's initiative in seeking to acquire the certificates or was the—did the initiative come from the certificate holders, who came to The Prudence Company and asked that [fol. 241] The Prudence Company take up their certificates?

A. I think the latter is true; that quite a few certificate holders came to the office of the company, requesting payment or requesting a new certificate.

Q. Were there any instances where The Prudence Company got in contact directly with the certificate holders, except through their salesmen, for the purchase of certificates?

A. No; not to my knowledge.

Q. With respect to the certificates which were acquired through the salesmen, which you described, what were the instructions issued to the salesmen?

A. I don't remember any specific instructions, other than the instructions which applied to every maturity. The general policy was to have the security holder invest the proceeds of the security. It was our main object to keep the certificate holders as clients. There were many cases where the certificate holders could not reinvest, and provision was made for security of the proceeds at the maturity date, and in those cases, because of the invocation of the eighteen months' clause on January 1, 1932, they were told that they would have to wait eighteen months, but that they would receive interest in the meantime.

Q. Were any substantial amounts acquired in any other series of certificates where the issue was about to mature—by "substantial" I mean an amount such as a third, or a quarter, etc.

A. I can't answer in all. I know they had a lot of certificates in practically all issues, but I don't know how big the amounts were.

Q. Would you say it is true, Mr. Bigg, that the general policy of The Prudence Company, with respect to maturing [fol. 242] issues, was to attempt to get the certificate holders to take securities of a later maturity?

A. Yes, sir.

Q. And that was the policy with respect to whether the salesmen were sent out to solicit the certificate holders or the certificate holders came to The Prudence Company's office with their certificates?

A. That's right.

Q. Do you know of any instance in connection with the Burnside issue where The Prudence Company refused to issue a security of a later maturity in exchange for a certificate that was about to mature?

A. That would be contrary to my statement before. There would be no such case—that would not happen. Why should we refuse to issue a security in exchange?

Q. Your answer is that there was no instance?

A. When the security holder wanted a reinvestment? The answer was "no".

Q. When the salesmen were sent out to acquire the maturing certificates in exchange for certificates that were about to mature, were the salesmen told to try to purchase the certificates at a discount if they could not get the certificate holder to make the exchange?

A. No, sir.

Q. Were any salesmen sent out to acquire non-maturing certificates?

A. Never to my knowledge.

Mr. Kriger: Mr. Bigg, do you remember Exhibit D?

Witness: Yes.

Mr. Kriger: Do you remember that on that exhibit there were a number of instances of certificates that were purchased at less than face amount?

[fol. 243] Witness: Yes, there were.

Mr. Kriger: Were any purchased by the salesmen?

Witness: No.

Mr. Kriger: They were all purchased by the—in the office?

Witness: Yes. The salesmen had no authority to purchase. If anybody wanted cash, they had to come to an officer to get it.

Mr. Schanzer: Mr. Bigg, in connection with your answer to the last question, your salesman had no authority to use the list of securities given to him to attempt the sale or resale of the new issues of Prudence certificates?

Witness: Yes, knowing that these people were to come into funds.

Mr. Schanzer: That practice of giving lists to salesmen several months before maturities—that practice was actually used by the company both prior as well as subsequent to 1932?

Witness: It was always our practice.

Mr. Schanzer: The regular practice of the company?

Witness: Yes.

Mr. Schanzer: So that you would say that as to the acquisition of the certificates in the Burnside issue in 1932, that was carrying out the regular practice of the company?

Witness: Yes, or in any other issue.

Mr. Schanzer: Also, with respect to these certificates which had not matured or matured for later issues—that [fol. 244] was based on the theory of keeping clients as was the prior practice of keeping clients in 1932.

Witness: Yes, surely.

Mr. Kriger: Mr. Bigg, except for the certificates purchased for the Pender, Buckbee, Merriam account, the other securities purchased at less than par were all purchased when the certificate holders had asked for part payment in cash?

Witness: He asked for it; he didn't insist; he asked for some cash.

Mr. Rich:

Q. Mr. Bigg, did The Prudence Company have any practice of purchasing securities, other than its own outstanding securities, which we have been discussing?

A. Our policy was always to repurchase or loan upon any of the outstanding Prudence issues.

Q. Other than Prudence?

A. Such a policy would naturally be set by the Board of Directors, and that would probably have been handled by the Treasurer, because I know at one time we did have quite a few other certificates that would come under my particular jurisdiction.

Q. But this particular thing, that is, the acquisition of the Prudence certificates, was under your jurisdiction?

A. Yes, generally, so far as the New York office was concerned.

Q. Do you know whether there was any committee or any other agency set up to consider the making of ordinary investments by The Prudence Company?

A. The policy was of the Board of Directors.

[fol. 245] Q. And you are not familiar with what that policy was in 1932?

A. No. My only familiarity was that the securities came to me to put in the vault.

Q. Then you don't know whether there was a general policy in 1932 of placing the corporate funds in investments?
A. No, sir.

Mr. Schanzer: Whether it was before or after 1932?
Witness: No.
Mr. Rich: Well, I guess that's all.

(Examination concluded at 3:25 P. M.)

[fol. 246] In Supreme Court of New York, New York County

Joseph W. Ferris, George L. Long and Henry Leifert as Trustees under a Declaration of Trust dated as of July 1st, 1938 with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, Plaintiffs,

against

Prudence Realization Corporation, City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees under the last Will and Testament of Herman Stutzer, deceased, and Irving Zauderer on behalf of themselves and other holders of certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, and such other holders as may appear or come in and defend this action, defendants

Complaint (Action No. 1)

Plaintiffs, complaining, allege:

First. Upon information and belief, the defendants, Prudence Realization Corporation and City Bank Farmers Trust Company, are domestic corporations.

Second. Upon information and belief, the defendant, Prudence Realization Corporation, was organized pursuant to a certain amended Plan of Reorganization of The Prudence Company, Inc. promulgated and adopted in a proceeding [fol. 247] in the United States District Court for the Eastern District of New York, entitled "In the Matter of The Prudence Company, Inc., Debtor. In the Matter of the General Plan of Reorganization Proposed by Reconstruc-

tion Finance Corporation. In Consolidated Proceedings for Reorganization under Section 77B of the Bankruptcy Act. Nos. 27496 and 27028." as amended and confirmed by order of said court bearing date the 26th day of May, 1939.

Third. Upon information and belief that heretofore and on or about the 20th day of June, 1927 The Prudence Company, Inc. became the owner of a certain bond and mortgage covering premises 307-13 West 36th Street, Borough of Manhattan, City of New York, made by Burnside Improvement Co. Inc. bearing date the 19th day of November, 1925 for the sum of $1,200,000.00 recorded in the office of the Register of the County of New York on the 20th day of November, 1925 in Liber 3624 of Mortgages, Page 431, Section 3, Block 760.

Fourth. Upon information and belief for the purpose of issuing mortgage participation certificates in the aforesaid bond and mortgage in the name of Prudence Bonds Corporation, a domestic corporation, and to have such certificates guaranteed by The Prudence Company, Inc., Prudence Bonds Corporation entered into a deposit agreement with The Bank of America, bearing date the 25th day of June, 1927 pursuant to the terms of which the bond and mortgage were to be assigned to The Bank of America, and the Prudence Bonds Corporation was authorized to issue mortgage [fol. 248] participation certificates and The Prudence Company, Inc. was to guaranty the payment of the principal and interest of such mortgage participation certificates so issued.

Fifth. Upon information and belief that pursuant to the aforesaid deposit agreement, The Prudence Company, Inc. assigned to the Prudence Bonds Corporation the aforesaid bond and mortgage by written agreement bearing date the 3rd day of August, 1927, which said assignment was recorded in the office of the Register of the County of New York on the 9th day of August, 1927 in Liber 3614, Page 172.

Sixth. Upon information and belief, pursuant to said deposit agreement, The Prudence Company, Inc. executed, acknowledged and delivered to The Bank of America, an instrument in writing bearing date the 3rd day of August, 1927 guaranteeing to each and every holder of certificates

of participation issued by The Prudence Bonds Corporation in and to the bond and mortgage heretofore described, the payment of interest when due according to the terms of each certificate so issued and the payment of principal and every instalment thereof, according to the terms of said guarantee, which said agreement appointed The Prudence Company, Inc. irrevocable agent for the collection of principal and interest on the said bond and mortgage.

Seventh. Upon information and belief thereafter certificates of participation in the aforesaid bond and mortgage were sold to various persons to the full extent of the aforesaid mortgage, to wit, the sum of $1,200,000.00.

[fol. 249] Eighth. Upon information and belief, said mortgage was thereafter reduced to the sum of $1,016,000.00.

Ninth. That the defendant, Prudence Realization Corporation, is now the holder and owner of mortgage participation certificates in the sum of $431,212.86, having acquired said certificates from various persons to whom the same had been issued.

Tenth. Upon information and belief some of said certificates were repurchased or exchanged for other investments pursuant to agreement of guaranty and because said certificates were by their terms due and payable.

Eleventh. That in a proceeding in the United States District Court for the Eastern District of New York entitled "In the Matter of Amalgamated Properties, Inc. In the Matter of a Plan of Reorganization of the Debtor in respect of 307 West 36th Street (Burnside) First Mortgage Participation Certificates. In Proceedings for the Reorganization of a Corporation under Section 77B of the Bankruptcy Act, No. 34791" there was duly confirmed as amended a Plan of Reorganization for the mortgage participation certificates in the mortgage hereinbefore described.

Twelfth. That pursuant to the said Plan of Reorganization of the mortgage participation certificates as amended and confirmed, the plaintiffs herein were appointed Trustees for the benefit of mortgage participation certificate holders.

Thirteenth. The plaintiffs herein have duly qualified as such Trustees by the filing of the bond required by the

[fol. 250] order appointing them and have executed and acknowledged the Declaration of Trust required by the said Plan of Reorganization and the orders of the Court.

Fourteenth. That under and pursuant to the aforesaid Plan of Reorganization, the orders amending and confirming it, the Declaration of Trust executed and acknowledged pursuant thereto, the rights of the holders of mortgage participation certificates in and to the bond and mortgage and in and to the guaranty of The Prudence Company, Inc. herein described were assigned to the plaintiffs herein as Trustees, and the bond and mortgage and the guaranty. That the title to the premises covered by said bond and mortgage was conveyed to the plaintiffs herein as Trustees, without affecting a merger of the mortgage with the fee and the plaintiffs are now the owners of said premises.

Fifteenth. In conformity with the Plan of Reorganization and the orders amending and confirming the same, Article IV, Section 3 of the Declaration of Trust provides in part as follows:

> Anything to the contrary herein notwithstanding, unless and until it shall have been finally adjudicated by a court of competent jurisdiction that The Prudence Company, Inc., Debtor in reorganization in a proceeding under Section 77B of the National Bankruptcy Act in the United States District Court for the Eastern District of New York, and/or its Trustees duly appointed in such proceeding or their respective successors or assigns, are entitled as holders of Certificates [fol. 251] to receive cash or other property or securities and to share in the proceeds of The Trust Estate on a parity with Certificate Holders other than said The Prudence Company, Inc., its Trustees or their respective successors and assigns, the Trustees shall make no distribution to said The Prudence Company, Inc., its Trustees and their respective successors or assigns, on account of any Certificates now owned or now held by them, and shall place and hold in escrow (without liability for the payment of interest) the share of any such cash, securities or other property otherwise distributable on account of such Certificates so owned or held by them, which shall be paid to The Prudence Company, Inc., and/or its Trustees, their successors or assigns

upon a final adjudication that the Certificates held by The Prudence Company, Inc., and/or its Trustees are entitled to share in the Trust Estate on a parity with other Certificate Holders. Such Certificates thereafter shall be entitled to participate in all distributions on a parity with all other Certificates.

In the event that such adjudication should be to the effect that the Certificates so held by said The Prudence Company, Inc., its Trustees or their respective successors or assigns, as holders of Certificates are not entitled to share in the proceeds of the Trust Estate on a parity with Certificate Holders other than said The Prudence Company, Inc., its Trustees or their respective successors or assigns, then one-half of any sums otherwise distributable as interest on account of such Certificates shall be paid into the Sinking Fund de- [fol. 252] scribed in Article V hereof, and the balance of such sums shall be distrbuted by the Trustees as additional interest on Certificates other than the Certificates held by said The Prudence Company, Inc., its Trustees and their respective successors and assigns, for the fiscal year in which said interest would otherwise have been due and payable, until the total amount of interest, including the regular interest payable on all other Certificates, for any such year paid on the Certificates, other than the Certificates held by said The Prudence Company, Inc., its Trustees or their respective successors and assigns, shall have been paid at the rate of 5% for such fiscal year, non-cumulative. If such balance is in excess of the amount required to pay such interest up to the rate of 5% per annum for such fiscal year, then such excess shall also be paid into the Sinking Fund described in Article V hereof.

Sixteenth. That pursuant to said Article IV of the Declaration of Trust the plaintiffs are holding the share distributable on account of certificates held by the Prudence Company, Inc., which said share amounts to the sum of $26,950.80.

Seventeenth. That the plaintiffs cannot make any distribution of the funds held by them as set forth above until the rights of all the Certificate holders, including the

Prudence Realization Corporation, have been determined and the plaintiffs instructed as to the distribution of said funds so held by them as aforesaid, and the distribution of similar funds in the future.

[fol. 253] Eighteenth. That the defendant, Prudence Realization Corporation, and all other persons who are holders of mortgage participation certificates are all the persons entitled to share in the trust estate and that the defendants, other than Prudence Realization Corporation, are made defendants on their own behalf and as representatives of all the holders of certificates other than the Prudence Realization Corporation.

Nineteenth. That the question, which is the subject of this action, is one of common and general interest to all the holders of mortgage participation certificates.

Twentieth. That the hoklers of certificates are three hundred and thirty-three in number. That many of them are not residents of this state and that it is impractical to bring all of them before this court.

Twenty-first. That plaintiffs have no adequate remedy at law.

For a Second Cause of Action the Plaintiffs

Twenty-second. Repeat and reallege the allegations contained in paragraphs "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Eighth" "Ninth", "Tenth", "Eleventh", "Twelfth", "Thirteenth", "Fourteenth", "Fifteenth", "Seventeenth", "Eighteenth", "Nineteenth" and "Twentieth" with the same force and effect as if herein set forth at length.

Twenty-third. Upon information and belief that prior to the 1st day of July, 1938 The Prudence Company, Inc. [fol. 254] made certain distributions on account of interest to the holders of mortgage participation certificates and that The Prudence Company, Inc. and its Trustees paid to itself and did deposit in an agency account various sums of money representing its pro rata share of the sum so distributed to certificate holders.

Twenty-fourth. That upon information and belief the said sums distrbuted to The Prudence Company, Inc. and its

Trustees or withheld by it or its Trustees was paid over to the defendant, Prudence Realization Corporation, pursuant to the Plan of Reorganization of The Prudence Company, Inc. as amended and confirmed by order of the United States District Court, Eastern District of New York, bearing date the 26th day of May, 1939, subject to the rights and equities of the plaintiffs as Trustees for the holders of mortgage participation certificates, and the defendant, Prudence Realization Corporation, now is in possession of such money.

Twenty-fifth. Upon information and belief, the certificates held by The Prudence Company, Inc. are subject and subordinate to the certificates held by the other certificate holders and The Prudence Company, Inc. was not entitled to receive any distribution with respect to certificates owned by it.

Twenty-sixth. Upon information and belief that under the provisions of the Plan of Reorganization and the Declaration of Trust, all cash property and other assets to which certificate holders could be entitled, were vested in the plaintiffs.

[fol. 255] Twenty-seventh. That plaintiffs have no knowledge of the exact amount of money received aforesaid by The Prudence Company, Inc.

Twenty-eighth. That the plaintiffs have no adequate remedy at law.

Wherefore plaintiffs pray for judgment—

1. Declaring the rights and interests of the Prudence Realization Corporation and all other certificate holders in and to the corpus and income of the trust estate.

2. That the defendant, Prudence Realization Corporation, be required to account for and turn over to the plaintiffs herein the sums of money distributed to or held by The Prudence Company, Inc. and/or Prudence Realization Corporation on account of the certificates set forth in the complaint.

3. That the plaintiffs be instructed as to the distribution of the funds now held by them as set forth in the complaint or to be turned over to them pursuant to the demand for judgment made herein, and of all similar funds to be collected by them in the future.

4. That the court fix and allow reasonable expenses and charges in connection with this action and make appropriate direction for the payment thereof.

5. That the court direct such notice of this action be given to such persons as it may deem proper.

[fol. 256] 6. That the plaintiff have the costs and disbursements of this action and such other and further relief as the court may deem proper in the premises.

Charles H. Kriger, Attorney for Plaintiff, Office and P. O. Address, 66 Court Street, Borough of Brooklyn, City of New York.

(Duly verified.)

In Supreme Court of New York, County of New York

[Same Title]

Answer of Prudence Realization Corporation

Defendant Prudence Realization Corporation, by Irving L. Schanzer, its attorney, answering the complaint of Joseph W. Ferris, George L. Long and Henry Leifert as Trustees under a Declaration of Trust dated as of July 1st, 1938 with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, plaintiffs, alleges:

As to the First Cause of Action

1. Upon information and belief, denies each and every allegation contained in the paragraph of the complaint numbered "Tenth".

[fol. 257] 2. Upon information and belief, denies each and every allegation contained in the paragraph of the complaint numbered "Fourteenth", except upon information and belief admits that under and pursuant to the Plan of Reorganization for the 307 West 36th Street (Burnside) First Mortgage Participation Certificates, the orders amending and confirming it, the Declaration of Trust executed and acknowledged pursuant thereto, the rights of the holders of mortgage participation certificates in and to the bond and mortgage described in the complaint were assigned to the plaintiffs herein as Trustees, and the bond and mortgage, and that the title to the premises covered by said bond and

mortgage were conveyed to the plaintiffs herein as Trustees without effecting a merger of the mortgage with the fee and that the plaintiffs are now the owner of said premises.

As to the Second Cause of Action

3. Upon information and belief, denies each and every allegation contained in the paragraph of the complaint numbered "Twenty-second" except, upon information and belief, admits the allegations contained in the paragraphs of the complaint numbered "First", "Second", "Third", "Fourth", "Fifth", "Sixth", "Seventh", "Eighth", "Ninth", "Eleventh", "Twelfth", "Thirteenth", "Fifteenth", "Seventeenth" "Eighteenth", "Nineteenth" and "Twentieth".

4. Upon information and belief, denies each and every allegation contained in the paragraph of the complaint num- [fol. 258] bered "Twenty-third" except, upon information and belief, admits that subsequent to February 1, 1935 and prior to the 1st day of July, 1938, the Trustees of The Prudence Company, Inc., Debtor paid over to the Estate of The Prudence Company, Inc., Debtor and did deposit in an agency account various sums of money representing interest earned upon the certificates in the said certificate issued owned by the said Trustees of The Prudence Company, Inc., Debtor.

5. Upon information and belief, denies each and every allegation contained in the paragraph of the complaint numbered "Twenty-fifth".

As and for a separate and distinct defense and for the purpose of seeking affirmative relief to determine the ultimate rights among the defendants pursuant to Section 264 of the Civil Practice Act, the defendant Prudence Realization Corporation respectfully shows this Court and alleges on information and belief:

6. That Prudence Realization Corporation is a corporation duly organized and existing under the Laws of the State of New York.

7. That The Prudence Company, Inc. is a corporation duly organized and existing under the Banking Law of the State of New York.

8. That prior to the commencement of this action a petition for the reorganization of The Prudence Company, Inc. under Section 77B of the National Bankruptcy Act was approved by order of Hon. Grover M. Moscowitz, United States District Judge for the Eastern District of [fol. 259] New York, which said order was dated February 1, 1935 and duly made and entered in the said proceeding entitled: "In the Matter of The Prudence Company, Inc., Debtor. In consolidated proceedings for reorganization under Section 77b of the Bankruptcy Act. Nos. 27496 and 27028." That by the terms of said order Stephen Callaghan, John M. McGrath and William T. Cowin were duly appointed Trustees of The Prudence Company, Inc., Debtor, and duly qualified as such trustees. That by orders duly made and entered in the said proceedings for the reorganization of The Prudence Company, Inc., Debtor, dated May 18, 1938 and February 6, 1939, the resignations of Stephen Callaghan and John M. McGrath, respectively, were accepted and that William T. Cowin is the sole remaining Trustee of The Prudence Company, Inc., Debtor.

9. That by order duly made and entered in said reorganization proceeding by Hon. Grover M. Moscowitz, dated April 25, 1938, it was found, declared, ordered and adjudged that The Prudence Company, Inc., Debtor, was insolvent within the true intent and meaning of Section 77B of the Federal Bankruptcy Act of 1938 as amended.

10. That prior to the commencement of this action and on May 26, 1939, an order was duly made and entered in the said proceedings for the reorganization of The Prudence Company, Inc., Debtor, confirming the Plan of Reorganization for the said Debtor which had been proposed by Reconstruction Finance Corporation, and that the said Plan of Reorganization provided for the claims of all creditors [fol. 260] of The Prudence Company, Inc., Debtor, including the claims of the various holders of certificates of participation in the Prudence-Bonds First Mortgage Participation Certificates of the 307 West 36th Street (Burnside) Issue.

11. That theretofore and prior to May 26, 1939, pursuant to orders entered in the said proceedings for the reorganization of The Prudence Company, Inc., Debtor, all claimants, including the holders of certificates of participation in the Prudence-Bonds First Mortgage Participation Certificates of the 307 West 36th Street (Burnside) Issue,

were required to file proofs of claim in the said reorganization proceeding and that thereafter and prior to May 26, 1939 such proofs of claim were filed and allowed by the United States District Court for the Eastern District of New York, in the said proceedings for the reorganization of The Prudence Company, Inc., Debtor, none of which claims, however, claimed any preference or priority by reason of the ownership by The Prudence Company, Inc. of certificates in said issue or any other issue.

12. That the said order of May 26, 1939 authorized and directed the transfer of all assets of The Prudence Company, Inc., Debtor, including $431,212.86 of certificates of participation in the mortgage described in the within complaint, to Prudence Realization Corporation, the new company organized pursuant to the provisions of said Plan of Reorganization, and further provided that claims of all creditors of The Prudence Company, Inc., Debtor, should continue as liabilities of Prudence Realization Corporation [fol. 261] only to the extent that the assets of said Prudence Realization Corporation shall be sufficient to pay such claims. That pursuant to said order, the assets of The Prudence Company, Inc., including the said $431,212.86 of certificates, were duly transferred to the said Prudence Realization Corporation which is now the owner and holder thereof.

13. That the said Plan of Reorganization for The Prudence Company, Inc., Debtor, and the confirmation order of May 26, 1939 further provided that since the Debtor was insolvent, stockholders of said Debtor corporation should not participate in any distributions thereafter made by Prudence Realization Corporation.

14. That the said order of May 26, 1939 and said Plan of Reorganization of The Prudence Company, Inc., Debtor, provided that no priority with respect to any claims of any creditors of The Prudence Company, Inc., Debtor, should exist except to the extent provided in said order and said Plan of Reorganization; that no priority to holders of guarantee claims is provided for therein.

15. That by reason of the foregoing all further liabilty of The Prudence Company, Inc. upon its guarantee of the certificates of participation in the mortgage described in the complaint is released and discharged.

16. That prior to the commencement of this action, a proceeding for the reorganization of Amalgamated Properties, Inc. under Section 77B of the National Bankruptcy Act [fol. 262] was instituted in the United States District Court for the Eastern District of New York, and the petition for its reorganization was approved by order of said Court entered in the said proceeding on March 16, 1936.

17. That among the assets of Amalgamated Properties, Inc. was the property located at 307 West 36th Street, Borough of Manhattan, New York City, which was subject to the mortgage described in the within complaint.

18. That by reason of the fact that The Prudence Company, Inc. and Amalgamated Properties, Inc. were reorganized under the provisions of Section 77B of the National Bankruptcy Act as hereinbefore alleged, the said Act and the decisions of the United States courts interpreting such Act and applicable thereto are conclusive and binding upon this court and the parties to this action, which said Act exclusively provided for the determination of all rights, claims and priorities affecting the property and assets involved in the aforesaid proceedings including the rights and claims of all holders of certificates of participation in the Prudence-Bonds Corporation First Mortgage Participation Certificates of the 307 West 36th Street (Burnside) Certificate Issue and by reason of the intent and purpose of the provisions of said Act and said decisions, the said certificates presently held by the Prudence Realization Corporation therein are entitled to parity with all holders of certificates in said certificate issue.

[fol. 263] Wherefore, defendant Prudence Realization Corporation prays that judgment be entered herein decreeing:

(1) that Prudence Realization Corporation, as holder of certificates of participation in the mortgage described in the complaint is entitled to receive from the plaintiffs herein the principal amounts and interest due on the said certificates on a parity with other certificate holders;

(2) that the plaintiffs herein distribute the said funds in their possession and which shall hereafter come into their possession accordingly;

(3) that the sum received by Prudence Realization Corporation from the Trustee of The Prudence Company, Inc., representing interest distributions on certificates of participation in the 307 West 36th Street (Burnside) Certificate Issue received by the Prudence Trustees after February 1, 1935, constitutes a corporate asset of Prudence Realization Corporation.

Irving L. Schanzer, Attorney for Defendant, Prudence Realization Corporation, Office and Post Office Address, 40 Exchange Place, Borough of Manhattan, City of New York.

(Duly verified.)

[fol. 264] In Supreme Court of New York, County of New York

[Same Title]

Answer of Realty Associates Securities Corporation

The defendant Realty Associates Securities Corporation, added as a defendant to this action by order of this Court dated September 29, 1941, answering the complaint of the plaintiffs herein.

First. Admits the allegations in paragraph Sixth contained that, pursuant to the deposit agreement therein mentioned, The Prudence Company, Inc. executed, acknowledged and delivered to The Bank of America an instrument in writing bearing date the 3rd day of August, 1927, guaranteeing to each and every holder of certificates of participation issued by Prudence-Bonds Corporation in and to the bond and mortgage therein and in said complaint described, the payment of interest when due according to the terms of each certificate so issued, and the payment of principal and every instalment thereof according to the terms of said guaranty, which said agreement appointed The Prudence Company, Inc. agent for the collection of principal and interest on the said bond and mortgage, and except as so admitted denies that it has knowledge or information sufficient to form a belief as to each and every other allegation in said paragraph Sixth contained.

Second. Denies that it has knowledge or information sufficient to form a belief as to each and every allegation [fol. 265] in paragraph Tenth of the said complaint contained.

Third. Admits the allegations of paragraph Sixteenth of said complaint that the plaintiffs are holding certain monies which might otherwise be distributable to the defendant Prudence Realization Corporation on account of these certificates held by it and denies that it has knowledge or information sufficient to form a belief as to each and every other allegation in said paragraph Sixteenth contained.

Fourth. Denies that it has knowledge or information sufficient to form a belief as to each and every allegation in paragraph Seventeenth of said complaint contained except, as hereinafter set forth, it has joined in the prayer of the complaint that the rights of all the certificate holders be declared and determined and that the plaintiffs as trustees be instructed as to the distribution of the funds held by them and as to the distribution of similar funds to be acquired by them in the future.

As and for a separate and distinct defense and for the purpose of seeking affirmative relief to determine the ultimate rights among the defendants, pursuant to Section 264 of the Civil Practice Act, the defendant, Realty Associates Securities Corporation, respectfully shows to this Court and alleges on information and belief.

Fifth. The defendant Realty Associates Securities Corporation is a domestic corporation and is the owner and [fol. 266] holder of one of the certificates hereinafter and in the complaint described in the principal sum of $6,500 and bearing the number 791.

Sixth. The defendant Prudence Realization Corporation is a domestic corporation organized pursuant to a certain amended plan of reorganization of The Prudence Company, Inc., duly confirmed in a proceeding in the United States District Court for the Eastern District of New York entitled "In the Matter of The Prudence Company, Inc., Debtor. In Consolidated Proceedings for Reorganization under Section 77B of the Bankruptcy Act Nos. 27496 and 27028", by an order of said Court bearing date the 26th day of May, 1939, and said Prudence Realization Corpora-

tion is the successor and assignee of The Prudence Company, Inc.

Seventh. That The Prudence Company, Inc., a domestic corporation, was, on or about the 20th day of June, 1927, the owner of a certain bond and mortgage affecting premises therein described in the City, County and State of New York known as 307-313 West 36th Street, Borough of Manhattan, City of New York, made by Burnside Improvement Co. bearing date the 19th day of November, 1925 in the principal sum of $1,200,000 and recorded in the office of the Register of the County of New York on the 20th day of November, 1925 in Liber 3624 of Mortgages at page 431.

Eighth. That on or about the 25th day of June, 1927 Prudence-Bonds Corporation and The Bank of America, both corporations duly organized and existing under the [fol. 267] laws of the State of New York, entered into an agreement in writing, hereinafter called the deposit agreement, wherein and whereby said bond and mortgage was to be assigned to said The Bank of America, and said Prudence-Bonds Corporation reserved the right to issue certificates evidencing the assignment of an undivided share or part in said bond and mortgage to the extent of the principal amount to be stated in such certificate (which certificates are hereinafter called the "certificates"), and the payment of the principal of and interest on which certificates was to be guaranteed by The Prudence Company, Inc. City Bank Farmers Trust Company is the successor of The Bank of America through the conversion of the latter into The Bank of America National Association and the conversion of said Association into Bank of America Trust Company and the merger of the latter into City Bank Farmers Trust Company.

Ninth. That thereafter and pursuant to said deposit agreement The Prudence Company, Inc., assigned to Prudence-Bonds Corporation said bond and mortgage by assignment dated the 3rd day of August, 1927 and duly recorded in the office of the Register of the County of New York on the 9th day of August, 1927 in Liber 3814 of Mortgages at page 172, and thereafter said Prudence-Bonds Corporation, pursuant to said deposit agreement, assigned said bond and mortgage to The Bank of America as depositor.

Tenth. On or about the 3rd day of August, 1927, The Prudence Company, Inc., executed, acknowledged and delivered to The Bank of America as depositary under said deposit agreement an instrument in writing dated on said [fol. 268] day guaranteeing, to each and every person who was or should become the holder of certificates issued or to be issued by Prudence-Bonds Corporation, the payment of interest when due according to the terms of each such certificate and the payment of principal and every instalment thereof according to the terms and conditions more fully set forth in said guaranty.

Eleventh. That thereafter and from time to time Prudence-Bonds Corporation issued such certificates to various persons to the full extent of the aforesaid mortgage, to wit, the sum of $1,200,000, and that thereafter said mortgage and the certificates therein outstanding were reduced to and now are in the principal sum of approximately $1,016,000 and are held by numerous persons, and that the defendant Realty Associates Securities Corporation is the holder of one of such certificates in the principal sum of $6,500.

Twelfth. That said The Prudence Company, Inc., the guarantor as aforesaid, thereafter became the owner and holder of certain of said certificates the exact amount of which is unknown to these defendants but is believed to be approximately the sum of $431,212.86, and that the defendant Prudence Realization Corporation, as the successor of said The Prudence Company, Inc., pursuant to the plan of reorganization alleged in paragraph Sixth hereof, is now the owner and holder of such certificates.

Thirteenth. That the plaintiffs were duly appointed trustees in a proceeding in the United States District Court for [fol. 269] the Eastern District of New York entitled "In the Matter of Amalgamated Properties, Inc., In the Matter of a Plan of Reorganization of the Debtor in respect of 307 West 36th Street (Burnside) First Mortgage Participation Certificates. In Proceedings for the Reorganization of a Corporation under Section 77B of the Bankruptcy Act No. 34791", in which proceeding there was duly confirmed a plan of reorganization affecting said certificates, and the plaintiffs have duly qualified and are now acting as such Trustees.

Fourteenth. That under and pursuant to said last mentioned plan and the orders amending and confirming the same and the declaration of trust executed and required to be executed pursuant thereto, said bond and mortgage, said guaranty of said The Prudence Company, Inc., the real and other property affected by said bond and mortgage, the rights of the holders of said certificates in and to said bond and mortgage and in and to said guaranty of The Prudence Company, Inc., together with any and all other property held for the benefit of the holders of said certificates, were duly assigned to the plaintiffs herein as such Trustees, without, however, affecting a merger of said mortgage with the fee of the premises affected thereby.

Fifteenth. That said plan of reorganization and the orders amending and confirming the same duly reserved for future determination the question of whether or not the certificates then held by said The Prudence Company, Inc., and now held by Prudence Realization Corporation as its successor as aforesaid, were entitled to share in the dis- [fol. 270] tributions made and to be made upon such certificates on a parity with the holders of all other such certificates and, in conformity with said plan and the orders amending and confirming the same, Article IV, Section 3, of the declaration of trust, executed and required to be executed by the plaintiffs herein, provides in part as follows:

> "Anything to the contrary herein notwithstanding, unless and until it shall have been finally adjudicated by a court of competent jurisdiction that The Prudence Company, Inc., Debtor in reorganization in a proceeding under Section 77B of the National Bankruptcy Act in the United States District Court for the Eastern District of New York, and/or its Trustees duly appointed in such proceedings or their respective successors or assigns, are entitled as holders of Certificates to receive cash or other property or securities and to share in the proceeds of the Trust Estate on a parity with Certificate Holders other than said The Prudence Company, Inc., its Trustees or their respective successors and assigns, the Trustees shall make no distribution to said The Prudence Company, Inc., its Trustees and their respective successors or assigns, on account of any Certificates now owned or now held

by them, and shall place and hold in escrow (without liability for the payment of interest) the share of any such cash, securities or other property otherwise distributable on account of such Certificates so owned or held by them, which shall be paid to The Prudence Company, Inc., and or its Trustees, their successors or assigns upon a final adjudication that the Certificates held by The Prudence Company, Inc., and or its Trus- [fol. 271] tees are entitled to share in the Trust Estate on a parity with other Certificate Holders. Such Certificates thereafter shall be entitled to participate in all distributions on a parity with all other Certificates.

In the event that such adjudication should be to the effect that the Certificates so held by said The Prudence Company, Inc., its Trustees or their respective successors or assigns, as holders of Certificates are not entitled to share in the proceeds of the Trust Estate on a parity with Certificate Holders other than said The Prudence Company, Inc., its Trustees or their respective successors or assigns, than one-half of any sums otherwise distributable as interest on account of such Certificates shall be paid into the Sinking Fund described in Article V hereof, and the balance of such sums shall be distributed by the Trustees as additional interest on Certificates other than the Certificates held by said The Prudence Company, Inc., its Trustees and their respective successors and assigns, for the fiscal year in which said interest would otherwise have been due and payable, until the total amount of interest, including the regular interest payable on all other Certificates, for any such year paid on the Certificates, other than the Certificates held by said The Prudence Company, Inc., its Trustees or their respective successors and assigns, shall have been paid at the rate of 5% for such fiscal year, non-cumulative. If such balance is in excess of the amount required to pay such interest up to the rate of 5% per annum for such fiscal year, then [fol. 272] such excess shall also be paid into the Sinking Fund described in Article V hereof."

Sixteenth. That no final adjudication by any court of competent jurisdiction, as required by said declaration of trust, has yet been made, and that accordingly and pursuant to said declaration of trust the plaintiffs now have in their pos-

session a large sum of money, the exact amount of which is unknown to this defendant and which would be distributable to said defendant Prudence Realization Corporation in the event that such adjudication should be to the effect that the certificates so held by it as aforesaid are entitled to share in such distributions on a parity with all other certificates and which, if such final adjudication were to the effect that the certificates held by defendant Prudence Realization Corporation as aforesaid were not entitled to share in such distributions on a parity with other certificates, would be distributed in accordance with said declaration of trust, to wit, one-half thereof to be paid into the sinking fund described in said declaration of trust and the other half thereof to be distributed as additional interest on certificates under the terms and conditions therein described.

Seventeenth. That prior to its reorganization and to the confirmation of the plan of reorganization described in paragraph Sixth hereof, said The Prudence Company, Inc., defaulted in the performance of its guaranty of payment of the interest on and principal of said certificates and said default has not been cured or waived.

[fol. 273] Eighteenth. That the certificates so held by Prudence Realization Corporation are, by reason of said default and the terms and conditions of the guaranty, the certificates and the deposit agreement aforementioned and by operation of law, subject and subordinate to the rights of all other certificate holders, and said Prudence Realization Corporation, as successor to said The Prudence Company, Inc., is not entitled to share in the proceeds of the trust estate held by the plaintiffs as aforesaid on a parity with all other holders of certificates.

Nineteenth. That the holders of certificates are large in number, the exact number not being known to this defendant but believed to be in excess of 300, and some of them may not be residents of this State and it is impractical to bring them all before this Court, and the question which is the subject of this action is of common and general interest to all the holders of such certificates.

Twentieth. That the defendant Prudence Realization Corporation, the plaintiffs, the other defendants and all other

persons who are holders of certificates, are all the persons entitled to share in the trust estate or interest therein.

Twenty-first. That this Court is a court of competent jurisdiction within the meaning of said plan and declaration of trust and for the purpose of determining the question reserved thereby.

[fol. 274] As and for a second separate and distinct defense and for the purpose of seeking affirmative relief to determine the ultimate rights among the defendants pursuant to Section 264, of the Civil Practice Act, and as and for a counterclaim against the defendant, Prudence Realization Corporation, the defendant, Realty Associates Securities Corporation, respectfully shows to this Court and alleges on information and belief.

Twenty-second. Repeats and realleges, with the same force and effect as if fully set forth herein, each and every allegation contained in paragraphs Fifth to Fifteenth of this answer, both inclusive.

Twenty-third. That from on or about February 1, 1935, to on or about July 1, 1938, The Prudence Company, Inc., and or its Trustees or Trustee in reorganization, appointed in the proceeding described in paragraph Sixth of this answer, acted or purported to act as servicing agent with respect to the mortgage described in paragraph Seventh of this answer, and made certain collections of the proceeds of said mortgage and certain distributions of such proceeds, or parts thereof, to the holders of certificates, including said The Prudence Company, Inc., and or its Trustees or Trustee, on account of the certificates held by it or them as aforesaid, the exact amount of such collections and distributions being unknown to this defendant.

Twenty-fourth. That the distributions so made were placed by said The Prudence Company, Inc., and or its [fol. 275] Trustees or Trustee in a so-called "agency account" and were earmarked and segregated from other funds and are now in a similar agency account, likewise earmarked and segregated, owned and held by the defendant, Prudence Realization Corporation, as successor to said The Prudence Company, Inc., as aforesaid, and subject to the rights and claims of the plaintiffs and of the holders of certificates, other than the defendant, Prudence Realization

Corporation. The exact amount of such funds is unknown to this defendant, but is believed to be in excess of $30,000.

Twenty-fifth. That no final adjudication by any court of competent jurisdiction, as required by said declaration of trust, has as yet been made, and the distributions held by the defendant, Prudence Realization Corporation, as described in paragraph Twenty-fourth hereof, if such final adjudications were to the effect that the certificates held by the defendant, Prudence Realization Corporation, were not entitled to share in such distributions on a parity with other certificates, would be distributed in accordance with said plan and declaration of trust, to wit: one-half thereof to be paid into the sinking fund described in said declaration of trust and the other half to be distributed as additional interest on certificates (other than those held by the defendant, Prudence Realization Corporation) under the terms and conditions described therein.

Twenty-sixth. Repeats and realleges, with the same force and effect as if fully set forth herein, each and every allegation contained in paragraphs Seventeenth to Twenty-[fol. 276] first, both inclusive, of this answer.

Twenty-seventh. That this defendant has no adequate remedy at law.

Wherefore, this defendant prays for judgment

1. Declaring the rights and interests of all certificate holders, and particularly of said defendant, Prudence Realization Corporation, in and to the corpus and income of the trust estate and all funds held by the plaintiffs and or the defendant, Prudence Realization Corporation, which may be distributable to the holders of the certificates;

2. Declaring that the rights and interests of defendant, Prudence Realization Corporation, as a holder of such certificates, are subject and subordinate to the rights of all other holders thereof, and that defendant, Prudence Realization Corporation, is not entitled to share in the proceeds of the trust estate held by the plaintiffs, on a parity with all other holders of certificates or until all of the other holders of certificates have been paid in full, and that all funds held by the plaintiffs or by defendant, Prudence Realization Corporation, pending the final adjudication pursuant to said declaration of trust, be distributed according

to the provisions of said declaration of trust in the event of a final determination that said certificates are not entitled to share on a parity;

3. That the plaintiffs, as Trustees, be instructed to distribute the funds now held by them and all similar funds to be collected by them in the future, or to be paid to them pursuant to the terms of any decree or judgment herein, [fol. 277] in accordance with the provisions of said declaration of trust in the event of a final adjudication that the certificate held by defendant, Prudence Realization Corporation, are not entitled to share on a parity with others;

4. Ordering the defendant, Prudence Realization Corporation, to pay to the plaintiffs as Trustees all amounts held by it as distributions on its certificates from February 1, 1935;

5. That the court fix and allow reasonable expenses, fees and charges in connection with this proceeding and make appropriate direction for the payment thereof out of said funds or such other funds as may to it seem just and proper, and that such notice of this action be given to such persons and in such manner as to the court may seem just and proper; and

6. That this defendant have such other, further and different relief as the court may deem just and proper in the premises, together with the costs and disbursements of this action against the defendant, Prudence Realization Corporation.

Delafield, Marsh, Porter & Hope, Attorneys for Defendant, Realty Associates Securities Corporation. Office and P. O. Address: 20 Exchange Place, Borough of Manhattan, City of New York.

(Duly verified.)

[fol. 278] In Supreme Court of New York, County of New York

[Same Title]

Answer of Prudence Realization Corporation to Answer of Realty Associates Securities Corporation

Defendant Prudence Realization Corporation, by Irving L. Schanzer, its attorney, as and for its Answer to the separate defenses contained in the Answer of the defendant Realty Associates Securities Corporation:

As to the first, separate and distinct defense:

1. Upon information and belief, denies each and every allegation contained in the paragraph of the Answer numbered "Fourteenth" except, upon information and belief, admits that under and pursuant to the Plan of Reorganization with respect to the 307 West 36th Street First Mortgage Participation Certificates and the orders amending and confirming the same and the Declaration of Trust executed and required to be executed pursuant thereto, said bond and mortgage, the real and other property affected by the said bond and mortgage, the rights of the holders of said certificates in and to said bond and mortgage, together with any and all other property held for the benefit of the holders of said certificates, were duly assigned to the plaintiffs herein as Trustees without, however, effecting a merger of said mortgage with the fee of the premises affected thereby.

[fol. 279] 2. Upon information and belief, denies each and every allegation contained in the paragraph of the Answer numbered "Seventeenth" except, upon information and belief, admits that prior to its reorganization and to the confirmation of the Plan of Reorganization described in paragraph "Sixth" of said Answer, The Prudence Company, Inc. defaulted in the performance of its guarantee of payment of the interest on and principal of said certificates.

3. Upon information and belief, denies each and every allegation contained in the paragraphs of the Answer numbered "Sixteenth" and "Eighteenth".

As to the Second, Separate and Distinct Defense:

4. Upon information and belief, denies each and every allegation contained in the paragraph of the Answer numbered "Twenty-second", except as hereinbefore admitted.

5. Upon information and belief, denies each and every allegation contained in the paragraph of the Answer numbered "Twenty-fourth" except, upon information and belief, admits that the distributions referred to in paragraph "Twenty-third" of the Answer were placed by the Trustees of The Prudence Company, Inc., Debtor in an "Agency Account".

6. Upon information and belief, denies each and every allegation contained in the paragraph of the Answer numbered "Twenty-fifth".

[fol. 280] As and for a separate and distinct defense and for the purpose of seeking affirmative relief to determine the ultimate rights among the defendants pursuant to Section 264 of the Civil Practice Act, the defendant Prudence Realization Corporation respectfully shows this Court and alleges on information and belief:

7. That Prudence Realization Corporation is a corporation duly organized and existing under the Laws of the State of New York.

8. That The Prudence Company, Inc. is a corporation duly organized and existing under the Banking Laws of the State of New York.

9. That prior to the commencement of this action, a petition for the reorganization of The Prudence Company, Inc. under Section 77B of the National Bankruptcy Act was approved by order of Hon. Grover M. Moscowitz, United States District Judge for the Eastern District of New York, which said order was dated February 1, 1935 and duly made and entered in the said proceeding entitled: "In the Matter of The Prudence Company, Inc., Debtor. In consolidated proceedings for reorganization under Section 77B of the Bankruptcy Act. Nos. 27496 and 27028. That by the terms of said Order Stephen Callaghan, John M. McGrath and William T. Cowin were duly appointed Trustees of The Prudence Company, Inc., Debtor, and duly qualified as such trustees. That by orders duly made and

entered in the said proceedings for the reorganization of The Prudence Company, Inc., Debtor, dated May 18, 1938 and February 6, 1939, the resignations of Stephen Cal- [fol. 281] laghan and John M. McGrath, respectively, were accepted and that William T. Cowin is the sole remaining Trustee of The Prudence Company, Inc., Debtor.

10. That by order duly made and entered in said reorganization proceeding by Hon. Grover M. Moscowitz, dated April 25, 1938, it was found, declared, ordered and adjudged that The Prudence Company, Inc., Debtor, was insolvent within the true intent and meaning of Section 77B of the Federal Bankruptcy Act of 1938 as amended.

11. That prior to the commencement of this action and on May 26, 1939, an order was duly made and entered in the said proceedings for the reorganization of The Prudence Company, Inc., Debtor, confirming the Plan of Reorganization for the said Debtor which had been proposed by Reconstruction Finance Corporation, and that the said Plan of Reorganization provided for the claims of all creditors of The Prudence Company, Inc., Debtor, including the claims of the various holders of certificates of participation in the Prudence-Bonds First Mortgage Participation Certificates of 307 West 36th Street (Burnside) Issue.

12. That theretofore and prior to May 26, 1939, pursuant to orders entered in the said proceeding for the reorganization of The Prudence Company, Inc., Debtor, all claimants, including the holders of certificates of participation in the Prudence-Bonds First Mortgage Participation Certificates of the 307 West 36th Street (Burnside) Issue, were required to file proofs of claim in the said reorganization pro- [fol. 282] ceeding and that thereafter and prior to May 26, 1939 such proofs of claim were filed and allowed by the United States District Court for the Eastern District of New York, in the said proceedings for the reorganization of The Prudence Company, Inc., Debtor, none of which claims, however, claimed any preference or priority by reason of the ownership by The Prudence Company, Inc. of Certificates in said issue or any other issue.

13. That the said order of May 26, 1939 authorized and directed the transfer of all assets of The Prudence Company, Inc., Debtor, including $431,212.86 of certificates of participation in the mortgage described in the within An-

swer, to Prudence Realization Corporation, the new company organized pursuant to the provisions of said Plan of Reorganization, and further provided that claims of all creditors of The Prudence Company, Inc., Debtor, should continue as liabilities of Prudence Realization Corporation only to the extent that the assets of said Prudence Realization Corporation shall be sufficient to pay such claims. That pursuant to said order, the assets of The Prudence Company, Inc., including the said $431,212.86 of certificates, were duly transferred to the said Prudence Realization Corporation, which is now the owner and holder thereof.

14. That the said Plan of Reorganization for The Prudence Company, Inc., Debtor, and the confirmation order of May 26, 1939 further provided that since the Debtor was insolvent, stockholders of said Debtor corporation should [fol. 283] not participate in any distributions thereafter made by Prudence Realization Corporation.

15. That the said order of May 26, 1939 and said Plan of Reorganization of the Prudence Company, Inc., Debtor, provided that no priority with respect to any claims of any creditors of The Prudence Company, Inc., Debtor, should exist except to the extent provided in said order and said Plan of Reorganization; that no priority to holders of guarantee claims is provided for therein.

16. That by reason of the foregoing all further liability of The Prudence Company, Inc. upon its guarantee of the certificates of participation in the mortgage described in the Answer is released and discharged.

17. That prior to the commencement of this action, a proceeding for the reorganization of Amalgamated Properties, Inc. under Section 77B of the National Bankruptcy Act was instituted in the United States District Court for the Eastern District of New York, and the petition for its reorganization was approved by order of said Court entered in the said proceeding on March 16, 1936.

18. That among the assets of Amalgamated Properties, Inc. was the property located at 307 West 36th Street, Borough of Manhattan, New York City, which was subject to the mortgage described in the within Answer.

19. That by reason of the fact that The Prudence Company, Inc. and Amalgamated Properties, Inc. were reorgan-

ized under the provisions of Section 77B of the National [fol. 284] Bankruptcy Act as hereinbefore alleged, the said Act and the decisions of the United States courts interpreting such Act and applicable thereto are conclusive and binding upon this court and the parties to this action, which said Act exclusively provided for the determination of all rights, claims and priorities affecting the property and assets involved in the aforesaid proceedings including the rights and claims of all holders of certificates of participation in the Prudence-Bonds Corporation First Mortgage Participation Certificates of the 307 West 36th Street (Burnside) Certificate Issue and by reason of the intent and purpose of the provisions of said Act and said decisions, the said certificates presently held by the Prudence Realization Corporation therein are entitled to parity with all holders of certificates in said certificate issue.

Wherefore, defendant Prudence Realization Corporation prays that judgment be entered herein decreeing:

(1) that Prudence Realization Corporation, as holder of certificates of participation in the mortgage described in the complaint is entitled to receive from the plaintiffs herein the principal amounts and interest due on the said certificate on a parity with other certificate holders:

(2) that the plaintiffs herein distribute the said funds in their possession and which shall hereafter come into their possession accordingly:

[fol. 285] (3) that the sum received by Prudence Realization Corporation from the Trustee of The Prudence Company, Inc., representing interest distributions on certificates of participation in the 307 West 36th Street (Burnside) Certificate Issue received by the Prudence Trustees after February 1, 1935, constitutes a corporate asset of Prudence Realization Corporation.

Irving L. Schanzer, Attorney for Defendant, Prudence Realization Corporation, Office and Post Office Address, 40 Exchange Place, Borough of Manhattan, City of New York.

(Duly verified.)

In Supreme Court of New York, County of New York

[Same Title.]

Answer of City Bank Farmers Trust Company et al.

The defendants, City Bank Farmers Trust Company, and Martin S. Lindgrove, as Trustees under the last Will and Testament of Herman Stutzer, deceased, on behalf of themselves and all other holders of the certificates here-[fol. 286] inafter mentioned and as representatives of all such holders, answering the complaint of the plaintiffs herein,

First. Admit the allegations in paragraph Sixth contained that, pursuant to the deposit agreement therein mentioned, The Prudence Company, Inc. executed, acknowledged and delivered to The Bank of America an instrument in writing bearing date the 3rd day of August, 1927, guaranteeing to each and every holder of certificates of participation issued by Prudence-Bonds Corporation in and to the bond and mortgage therein and in said complaint described, the payment of interest when due according to the terms of each certificate so issued, and the payment of principal and every instalment thereof according to the terms of said guaranty, which said agreement appointed The Prudence Company, Inc. agent for the collection of principal and interest on the said bond and mortgage, and except as so admitted deny that they have knowledge or information sufficient to form a belief as to each and every other allegation in said paragraph Sixth contained.

Second. Admit the allegations in paragraph Ninth contained that Prudence Realization Corporation is the owner of certain mortgage participation certificates, the exact amount of which being unknown to these defendants, and except as so admitted, deny that they have knowledge or information sufficient to form a belief as to each and every other allegation in said paragraph Ninth contained.

Third. Deny that they have knowledge or information sufficient to form a belief as to each and every allegation [fol. 287] in paragraph Tenth of said complaint contained.

Fourth. Admit the allegations of paragraph Sixteenth that the plaintiffs are holding certain moneys which might

otherwise be distributable to Prudence Realization Corporation on account of certificates held by it, and deny that they have knowledge or information sufficient to form a belief as to each and every other allegation in said paragraph Sixteenth contained.

Fifth. Deny that they have knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph Seventeenth of said complaint, except that, as hereinafter set forth, they have joined in the prayer of the complaint that the rights of all certificate holders be declared and determined and the plaintiffs be instructed as to the distribution of funds held by them and as to the distribution of funds in the future.

Sixth. Deny that they have knowledge or information sufficient to form a belief with respect to the allegation in paragraph Twentieth of said complaint contained that the holders of certificates are 333 in number.

Seventh. Deny that they have knowledge or information sufficient to form a belief as to the allegations in paragraph Twenty-third of the complaint contained.

[fol. 288] As and for a separate and distinct defense and for the purpose of seeking affirmative relief to determine the ultimate rights among the defendants, pursuant to Section 264 of the Civil Practice Act, the defendants City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees under the last will and testament of Herman Stutzer, deceased, on behalf of themselves and all other holders of the certificates hereinafter mentioned and such other holders as may appear or come in and defend this action and as representatives of all such holders except the defendant Prudence Realization Corporation, respectfully show to this Court and allege on information and belief

Eighth. City Bank Farmers Trust Company is a domestic corporation and it and Martin S. Lindgrove have duly qualified and are now acting as Trustees under the last Will and Testament of Herman Stutzer, deceased.

Ninth. The defendant Prudence Realization Corporation is a domestic corporation organized pursuant to a certain amended plan of reorganization of The Prudence Company, Inc., duly confirmed in a proceeding in the Unitd States District Court for the Eastern District of New York en-

titled "In the Matter of The Prudence Company, Inc., Debtor. In Consolidated Proceedings for Reorganization under Section 77B of the Bankruptcy Act Nos. 27496 & 27028", by an order of said Court bearing date the 26th day of May, 1939, and said Prudence Realization Corporation is the sucessor and assignee of The Prudence Company, Inc.

[fol. 289] Tenth. That The Prudence Company, Inc., a domestic corporation, was on or about the 20th day of June, 1927, the owner of a certain bond and mortgage affecting premises therein described in the City, County and State of New York known as 307-313 West 36th Street, Borough of Manhattan, City of New York, made by Burnside Improvement Co. bearing date the 19th day of November, 1925 in the principal sum of $1,200,000 and recorded in the office of the Register of the County of New York on the 20th day of November, 1925 in Liber 3624 of Mortgages at page 431.

Eleventh. That on or about the 25th day of June, 1927 Prudence-Bonds Corporation and The Bank of America, both corporations duly organized and existing under the laws of the State of New York, entered into an agreement in writing, hereinafter called the deposit agreement, wherein and whereby said bond and mortgage was to be assigned to said The Bank of America, and said Prudence-Bonds Corporation reserved the right to issue certificates evidencing the assignment of an undivided share or part in said bond and mortgage to the extent of the principal amount to be stated in such certificate (which certificates are hereinafter called the "certificates"), and the payment of the principal of and interest on which certificates was to be guaranteed by The Prudence Company, Inc. City Bank Farmers Trust Company is the successor of The Bank of America through the conversion of the latter into The Bank of America National Association and the conversion of said Association into Bank of America Trust Company and the merger of the latter into City Bank Farmers Trust Company.

[fol. 290] Twelfth. That thereafter and pursuant to said deposit agreement The Prudence Company, Inc. assigned to Prudence-Bonds Corporation said bond and mortgage by assignment dated the 3rd day of August, 1927 and duly recorded in the office of the Register of the County of New

York on the 9th day of August, 1927 in Liber 3814 of Mortgages at page 172, and thereafter said Prudence-Bonds Corporation, pursuant to said deposit agreement, assigned said bond and mortgage to The Bank of America as depositor.

Thirteenth. On or about the 3rd day of August, 1927, The Prudence Company, Inc. executed, acknowledged and delivered to The Bank of America as depositary under said deposit agreement an instrument in writing dated on said day guaranteeing, to each and every person who was or should become the holder of certificates issued or to be issued by Prudence-Bonds Corporation, the payment of interest when due according to the terms of each such certificate and the payment of principal and every instalment thereof according to the terms and conditions more fully set forth in said guaranty.

Fourteenth. That thereafter and from time to time Prudence-Bonds Corporation issued such certificates to various persons to the full extent of the aforesaid mortgage, to wit, the sum of $1,200,000, and that thereafter said mortgage and the certificates therein outstanding were reduced to and now are in the principal sum of approximately $1,016,000 and are held by numerous persons, and that the defendants City Bank Farmers Trust Company and Martin S. Lind-
[fol. 291] grove, as Trustees of the estate of Herman Stutzer, deceased, are the holders of certain of such certificates totaling in the aggregate the principal sum of $5,000.

Fifteenth. That said The Prudence Company, Inc., the guarantor as aforesaid, thereafter became the owner and holder of certain of said certificates the exact amount of which is unknown to these defendants but is believed to be approximately the sum of $431,212.86, and that the defendant Prudence Realization Corporation, as the successor of said The Prudence Company, Inc. pursuant to the plan of reorganization alleged in paragraph Ninth hereof is now the owner and holder of such certificates.

Sixteenth. That the plaintiffs were duly appointed trustees in a proceeding in the United States District Court for the Eastern District of New York entitled "in the Matter of Amalgamated Properties, Inc. In the Matter of a Plan of Reorganization of the Debtor in respect of 307 West 36th Street (Burnside) First Mortgage Participation Cer-

tificates. In Proceedings for the Reorganization of a Corporation under Section 77B of the Bankruptcy Act No. 34791", in which proceeding there was duly confirmed a plan of reorganization affecting said certificates, and the plaintiffs have duly qualified and are now acting as such Trustees.

Seventeenth. That under and pursuant to said last mentioned plan and the orders amending and confirming the same and the declaration of trust executed and required to [fol. 292] be executed pursuant thereto, said bond and mortgage, said guaranty of said The Prudence Company, Inc., the real and other property affected by said bond and mortgage, the rights of the holders of said certificates in and to said bond and mortgage and in and to said guaranty of The Prudence Company, Inc., together with any and all other property held for the benefit of the holders of said certificates, were duly assigned to the plaintiffs herein as such Trustees, without, however, effecting a merger of said mortgage with the fee of the premises affected thereby.

Eighteenth. That said plan of reorganization and the orders amending and confirming the same duly reserved for future determination the question of whether or not the certificates then held by said The Prudence Company, Inc. and now held by Prudence Realization Corporation as its successor as aforesaid, were entitled to share in the distributions made and to be made upon such certificates on a parity with the holders of all other such certificates and, in conformity with said plan and the orders amending and confirming the same, Article IV, Section 3, of the declaration of trust, executed and required to be executed by the plaintiffs herein, provides in part as follows:

> "Anything to the contrary herein notwithstanding, unless and until it shall have been finally adjudicated by a court of competent jurisdiction that The Prudence Company, Inc., Debtor in reorganization in a proceeding under Section 77B of the National Bankruptcy Act in the United States District Court for the Eastern District of New York, and or its Trustees duly ap- [fol. 293] pointed in such proceeding or their respective successors or assigns, are entitled as holders of Certificates to receive cash or other property or securities and

to share in the proceeds of the Trust Estate on a parity with Certificate Holders other than said The Prudence Company, Inc., its Trustees or their respective successors and assigns, the Trustees shall make no distribution to said The Prudence Company, Inc., its Trustees and their respective successors or assigns, on account of any Certificates now owned or now held by them, and shall place and hold in escrow (without liability for the payment of interest) the share of any such cash, securities or other property otherwise distributable on account of such Certificates so owned or held by them, which shall be paid to The Prudence Company, Inc., and/or its Trustees, their successors or assigns upon a final adjudication that the Certificates held by The Prudence Company, Inc., and/or its Trustees are entitled to share in the Trust Estate on a parity with other Certificate Holders. Such Certificates thereafter shall be entitled to participate in all distributions on a parity with all other Certificates.

In the event that such adjudication should be to the effect that the Certificates so held by said The Prudence Company, Inc., its Trustees or their respective successors or assigns, as holders of Certificates are not entitled to share in the proceeds of the Trust Estate on a parity with Certificate Holders other than said The Prudence Company, Inc., its Trustees or their respective successors or assigns, then one-half of any sums [fol. 294] otherwise distributable as interest on account of such Certificates shall be paid into the Sinking Fund described in Article V hereof, and the balance of such sums shall be distributed by the Trustees as additional interest on Certificates other than the Certificates held by said The Prudence Company, Inc., its Trustees and their respective successors and assigns, for the fiscal year in which said interest would otherwise have been due and payable, until the total amount of interest, including the regular interest payable on all other Certificates, for any such year paid on the Certificates, other than the Certificates held by said The Prudence Company, Inc., its Trustees or their respective successors and assigns, shall have been paid at the rate of 5% for such fiscal year, non-cumulative. If such balance is in excess of the amount required to pay such interest up to the rate of 5% per annum for such

fiscal year, then such excess shall also be paid into the Sinking Fund described in Article V hereof."

Nineteenth. That no final adjudication by any court of competent jurisdiction, as required by said declaration of trust, has yet been made, and that accordingly and pursuant to said declaration of trust the plaintiffs now have in their possession a large sum of money, the exact amount of which is unknown to these defendants and which would be distributable to said Prudence Realization Corporation in the event that such adjudication should be to the effect that the certificates so held by it as aforesaid are entitled to share in such distributions on a parity with all other certifi-
[fol. 295] cates and which, if such final adjudication were to the effect that the certificates held by Prudence Realization Corporation as aforesaid were not entitled to share in such distributions on a parity with other certificates, would be distributed in accordance with said declaration of trust, to wit, one-half thereof to be paid into the sinking fund described in said declaration of trust and the other half thereof to be distributed as additional interest on certificates under the terms and conditions therein described.

Twentieth. That prior to its reorganization and to the confirmation of the plan of reorganization described in paragraph Ninth hereof, said The Prudence Company, Inc. defaulted in the performance of its guaranty of payment of the interest on and principal of said certificates and said default has not been cured or waived.

Twenty-first. That the certificates so held by Prudence Realization Corporation are, by reason of said default and the terms and conditions of the guaranty, the certificates and the deposit agreement aforementioned and by operation of law, subject and subordinate to the rights of all other certificate holders, and said Prudence Realization Corporation, as successor to said The Prudence Company, Inc., is not entitled to share in the proceeds of the trust estate held by the plaintiffs as aforesaid on a parity with all other holders of certificates.

Twenty-second. That the holders of certificates are large in number, the exact number not being known to these defendants but believed to be in excess of 300, and some
[fol. 296] of them may not be residents of this State and it is

impractical to bring them all before this Court, and the question which is the subject of this action is of common and general interest to all the holders of such certificates.

Twenty-third. That the defendant Prudence Realization Corporation, the plaintiffs, the other defendants and all other persons who are holders of certificates, are all the persons entitled to share in the trust estate or interested therein, and the defendants City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees of the estate of Herman Stutzer, deceased, as aforesaid, are made defendants and are answering herein on their own behalf and on behalf and as representatives of all the holders of certificates other than the defendant Prudence Realization Corporation.

Twenty-fourth. That this Court is a court of competent jurisdiction within the meaning of said plan and declaration of trust and for the purpose of determining the question reserved thereby.

Wherefore defendants pray for judgment:

1. declaring the rights and interests of all certificate holders, and particularly of said Prudence Realization Corporation, in and to the corpus and the income of the trust estate and all funds held by the plaintiffs and/or Prudence Realization Corporation which may be distributable to the holders of certificates;

[fol. 297] 2. declaring that the rights and interests of Prudence Realization Corporation as holder of such certificates are subject and subordinate to the rights of all other holders thereof and that Prudence Realization Corporation is not entitled to share in the proceeds of the trust estate held by the plaintiffs on a parity with all other holders of certificates and that all funds held by the plaintiffs or by said Prudence Realization Corporation pending the final adjudication pursuant to said declaration of trust be distributed according to the provisions of said declaration of trust in the event of a final determination that said certificates are not entitled to share on a parity with all other certificates;

3. that the plaintiffs be instructed to distribute the funds now held by them and all similar funds to be collected by

them in the future in accordance with the provisions of said declaration of trust in the event of a final adjudication that the certificates held by Prudence Realization Corporation are not entitled to share on a parity;

4. that the court fix and allow reasonable expenses, fees and charges in connection with this action and make appropriate direction for the payment thereof out of said funds so held or such other funds as may to it seem just and proper, and that such notice of this action be given to such persons in such manner as the Court may deem proper;

5. that the answering defendants have costs and disbursements of this action against Prudence Realization Corporation, and such other, further and different relief [fol. 298] as the Court may deem just and proper in the premises.

Delafield, Marsh, Porter & Hope, Attorneys for Defendants, City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees under the Last Will and Testament of Herman Stutzer, Deceased, Office and P. O. Address, 20 Exchange Place, Borough of Manhattan, City of New York.

(Duly verified.)

In Supreme Court of New York, County of New York

[Same Title]

Answer of Prudence Realization Corporation to Answer of City Bank Farmers Trust Company et al.

Defendant Prudence Realization Corporation, by Irving L. Schanzer, its attorney, as and for its Answer to the separate defenses contained in the Answer of the defendants City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees under the Last Will and Testament of Herman Stutzer, deceased:

[fol. 299] As to the Separate and Distinct Defense:

1. Upon information and belief, denies each and every allegation contained in the paragraph of the Answer numbered "Seventeenth" except, upon information and belief,

admits that under and pursuant to the Plan of Reorganization with respect to the 307 West 36th Street First Mortgage Participation Certificates and the orders amending and confirming the same and the Declaration of Trust executed and required to be executed pursuant thereto, said bond and mortgage, the real and other property affected by the said bond and mortgage, the rights of the holders of said certificates in and to said bond and mortgage, together with any and all other property held for the benefit of the holders of said certificates, were duly assigned to the plaintiffs herein as Trustees without, however, effecting a merger of said mortgage with the fee of the premises affected thereby.

2. Upon information and belief, denies each and every allegation contained in the paragraph of the Answer numbered "Nineteenth".

3. Upon information and belief, denies each and every allegation contained in the paragraph of the Answer numbered "Twentieth" except, upon information and belief, admits that prior to its reorganization and to the confirmation of the Plan of Reorganization described in paragraph "Ninth" of said Answer, said The Prudence Company, Inc. defaulted in the performance of its guarantee of payment of the interest on and principal of said certificates.

[fol. 300] 4. Upon information and belief, denies each and every allegation contained in the paragraph of the Answer numbered "Twenty-first."

As and for a separate and distinct defense and for the purpose of seeking affirmative relief to determine the ultimate rights among the defendants pursuant to Section 264 of the Civil Practice Act, the defendant Prudence Realization Corporation respectfully shows this Court and alleges on information and belief:

5. That Prudence Realization Corporation is a corporation duly organized and existing under the Laws of the State of New York.

6. That The Prudence Company, Inc. is a corporation duly organized and existing under the Banking Law of the State of New York.

7. That prior to the commencement of this action, a petition for the reorganization of The Prudence Company, Inc.

under Section 77B of the National Bankruptcy Act was approved by order of Hon. Grover M. Moscowitz, United States District Judge for the Eastern District of New York, which said order was dated February 1, 1935 and duly made and entered in the said proceeding entitled: "In the Matter of The Prudence Company, Inc., Debtor. In consolidated proceedings for reorganization under Section 77B of the Bankruptcy Act. Nos. 27496 and 27028. That by the terms of said order Stephen Callaghan, John M. McGrath and William T. Cowin were duly appointed Trustees of The Prudence Company, Inc., Debtor, and duly qualified as such [fol. 301] trustees. That by orders duly made and entered in the said proceedings for the reorganization of The Prudence Company, Inc., Debtor, dated May 18, 1938 and February 6, 1939, the resignations of Stephen Callaghan and John M. McGrath, respectively, were accepted and that William T. Cowin is the sole remaining Trustee of The Prudence Company, Inc., Debtor.

8. That by order duly made and entered in said reorganization proceeding by Hon. Grover M. Moscowitz, dated April 25, 1938, it was found, declared, ordered and adjudged that The Prudence Company, Inc., Debtor, was insolvent within the true intent and meaning of Section 77B of the Federal Bankruptcy Act of 1938 as amended.

9. That prior to the commencement of this action and on May 26, 1939, an order was duly made and entered in the said proceedings for the reorganization of The Prudence Company, Inc., Debtor, confirming the Plan of Reorganization for the said Debtor which had been proposed by Reconstruction Finance Corporation, and that the said Plan of Reorganization provided for the claims of all creditors of The Prudence Company, Inc., Debtor, including the claims of the various holders of certificates of participation in the Prudence-Bonds First Mortgage Participation Certificates of the 307 West 36th Street (Burnside) Issue.

10. That theretofore and prior to May 26, 1939, pursuant to orders entered in the said proceeding for the reorganization of The Prudence Company, Inc., Debtor, all claimants, including the holders of certificates of participation in the Prudence-Bonds First Mortgage Participation Certificates of the 307 West 36th Street (Burnside) Issue, were re- [fol. 302] quired to file proofs of claim in the said reorgani-

zation proceeding and that thereafter and prior to May 26, 1939 such proofs of claim were filed and allowed by the United States District Court for the Eastern District of New York, in the said proceedings for the reorganization of The Prudence Company, Inc., Debtor, none of which claims, however, claimed any preference or priority by reason of the ownership by The Prudence Company, Inc. of certificates in said issue or any other issue.

11. That the said order of May 26, 1939 authorized and directed the transfer of all assets of The Prudence Company, Inc., Debtor, including $431,212.86 of certificates of participation in the mortgage described in the within Answer, to Prudence Realization Corporation, the new company organized pursuant to the provisions of said Plan of Reorganization, and further provided that claims of all creditors of The Prudence Company, Inc., Debtor, should continue as liabilities of Prudence Realization Corporation only to the extent that the assets of said Prudence Realization Corporation shall be sufficient to pay such claims. That pursuant to said order, the assets of The Prudence Company, Inc., including the said $431,212.86 of certificates, were duly transferred to the said Prudence Realization Corporation, which is now the owner and holder thereof.

12. That the said Plan of Reorganization for The Prudence Company, Inc., Debtor, and the confirmation order of May 26, 1939 further provided that since the Debtor was insolvent, stockholders of said Debtor corporation should [fol. 303] not participate in any distributions thereafter made by Prudence Realization Corporation.

13. That the said order of May 26, 1939 and said Plan of Reorganization of The Prudence Company, Inc., Debtor, provided that no priority with respect to any claims of any creditors of The Prudence Company, Inc., Debtor, should exist except to the extent provided in said order and said Plan of Reorganization; that no priority to holders of guarantee claims is provided for therein.

14. That by reason of the foregoing all further liability of The Prudence Company, Inc. upon its guarantee of the certificates of participation in the mortgage described in the Answer is released and discharged.

15. That prior to the commencement of this action, a proceeding for the reorganization of Amalgamated Properties, Inc. under Section 77B of the National Bankruptcy Act was instituted in the United States District Court for the Eastern District of New York, and the petition for its reorganization was approved by order of said Court entered in the said proceeding on March 16, 1936.

16. That among the assets of Amalgamated Properties, Inc. was the property located at 307 West 36th Street, Borough of Manhattan, New York City, which was subject to the mortgage described in the within Answer.

17. That by reason of the fact that The Prudence Company, Inc. and Amalgamated Properties, Inc. were reorganized under the provisions of Section 77B of the National [fol. 304] Bankruptcy Act as hereinbefore alleged, the said Act and the decisions of the United States courts interpreting such Act and applicable thereto are conclusive and binding upon this court and the parties to this action, which said Act exclusively provided for the determination of all rights, claims and priorities affecting the property and assets involved in the aforesaid proceedings including the rights and claims of all holders of certificates of participation in the Prudence-Bonds Corporation First Mortgage Participation Certificates of the 307 West 36th Street (Burnside) Certificate Issue and by reason of the intent and purpose of the provisions of said Act and said decisions, the said certificates presently held by the Prudence Realization Corporation therein are entitled to parity with all holders of certificates in said certificate issue.

Wherefore, defendant Prudence Realization Corporation prays that judgment be entered herein decreeing:

(1) that Prudence Realization Corporation, as holder of certificates of participation in the mortgage described in the complaint is entitled to receive from the plaintiffs herein the principal amounts and interest due on the said certificates on a parity with other certificate holders;

(2) that the plaintiffs herein distribute the said funds in their possession and which shall hereafter come into their possession accordingly;

[fol. 305] (3) that the sum received by Prudence Realization Corporation from the Trustee of The Prudence Company, Inc., representing interest distributions on certificates of participation in the 307 West 36th Street (Burnside) Certificate Issue received by the Prudence Trustees after February 1, 1935, constitutes a corporate asset of Prudence Realization Corporation.

Irving L. Schanzer, Attorney for Defendant, Prudence Realization Corporation, Office and P. O. Address, 40 Exchange Place, Borough of Manhattan, City of New York.

(Duly verified.)

[fol. 306] In Supreme Court of New York, County of New York

Solomon Zauderer, Milton Kimmelman, Irving Zauderer and Charles Kimmelman, Doing Business as Kimmelman and Zauderer, on Behalf of Themselves and All Other Holders of Prudence Bonds Corporation Participating Certificates of the 307 West 36th Street (Burnside) First Mortgage Participation Certificate Issue Who Shall Come in and Join as Parties to this Action, Plaintiffs,

against

Prudence Realization Corporation and Joseph W. Ferris, Henry Leifert and George L. Long as Trustees under a Declaration of Trust dated as of July 1, 1938, with Respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, Defendants

Complaint (Action No. 2)

Plaintiffs above named for themselves and on behalf of all other holders of Prudence Bonds Corporation participating certificates of the 307 West 36th Street (Burnside) First Mortgage Participation Certificate issue, who shall come in and join as parties to this action, by their attorney Albert W. Fribourg, respectfully show and allege:

1. Upon information and belief that defendant Prudence [fol. 307] Realization Corporation is a domestic corporation

duly organized and existing under and by virtue of the Laws of the State of New York.

2. That plaintiffs are the owners and holders of certificates of the 307 West 36th Street (Burnside) First Mortgage Participation Certificate issue.

3. That annexed hereto and made part hereof and marked Exhibit A is a copy of the form of participation certificate issued by Prudence Bonds Corporation to the holders of participating interests in the said issue.

4. That pursuant to a plan of reorganization confirmed by the United States District Court for the Eastern District of New York, defendants Joseph W. Ferris, Henry Leifert and George L. Long were appointed Trustees of the 307 West 36th Street (Burnside) First Mortgage Participation Certificate issue to serve under a Declaration of Trust approved by the said United States District Court as part of the said plan of reorganization.

5. That the said defendants Joseph W. Ferris, Henry Leifert and George L. Long thereafter executed the said Declaration of Trust as of July 1, 1938 and qualified as such Trustees, and by executing the said Declaration of Trust and qualifying thereunder the said defendants as Trustees became vested with all right, title and interest in and to the trust estate therein described in trust for the pro-rata benefit and security of the holders of the said issue with the rights, duties, obligations and powers provided in said Declaration of Trust.

[fol. 308] 6. Upon information and belief that at the time of the adoption of the plan of reorganization and the execution of said Declaration of Trust, the persons to whom certificates in the above mentioned issue had been sold and their successors and assigns held certificates in the aggregate principal amount of $584,788.00, and that The Prudence Company, Inc., the guarantor of the issue or its Trustees, held the balance thereof in the amount of $431,212.00.

7. That section 4 of said plan of reorganization provided as follows:

> "Except as in this section provided, the certificates now outstanding, including so-called 'unissued certificates,' amounting to the sum of $1,016,000, shall be en-

titled to participate in this Plan without priority of any one certificate over any other certificate. A question has arisen with respect to the rights of The Prudence Company, Inc., or its Trustees on account of the certificates held or claimed by them, including so-called 'unissued certificates.' Anything in the Plan to the contrary notwithstanding, the Trustees to be appointed hereunder shall make no distributions of cash or other property or securities which would be otherwise distributable on account of the certificates now held or claimed by The Prudence Company, Inc., or its Trustees, including said 'unissued certificates,' unless and until it shall have been finally adjudicated by a Court of competent jurisdiction whether or not The Prudence Company, Inc., or its Trustees, or their successors or [fol. 309] assigns, are entitled to receive such cash or other property or securities and to share in the proceeds of the property to be assigned to the Trustee pursuant to the Plan and on a parity with other certificate holders or otherwise. The actual distribution of such cash, securities or other property shall be made in accordance with such final adjudication. Pending such final adjudication the Trustee to be appointed pursuant to the Plan shall hold in escrow the share of any cash, property or other securities distributable under the Plan to which the certificates held by The Prudence Company, Inc. or its Trustees, including said 'unissued certificates,' would be entitled if owned and held by persons other than The Prudence Company, Inc., or its Trustees. Until such final adjudication such certificates and said unissued certificates shall not be subject to purchase, retirement or redemption out of the Sinking Fund. All documents necessary to carry this paragraph into effect shall contain such provisions with respect to the duties of the Trustee to be appointed under the Plan as shall be appropriate to carry out the intent hereof pending such final adjudication."

8. Upon information and belief that defendant Prudence Realization Corporation now is the holder of the certificates formerly held by The Prudence Company, Inc., or its Trustees, having succeeded thereto in accordance with the provisions of a plan of reorganization of The Prudence Company, Inc.

9. Upon information and belief that defendants Joseph [fol. 310] W. Ferris, Henry Leifert and George L. Long as Trustees aforesaid, are holding the sum of $21,560.64 or an amount in excess thereof representing the share of interest distributions applicable to the certificates held by defendant Prudence Realization Corporation pending a determination of the status of the said certificates and the right of the holder thereof to share in the proceeds of the trust estate.

10. That more than two years have elapsed since the adoption of the plan of reorganization of the 307 West 36th Street (Burnside) First Mortgage Participation Certificate issue and no adjudication has been made respecting the status of the said certificates.

11. That doubt exists as to whether an action to determine the status of the said certificates resides in the certificate holders of the issue or the defendants Joseph W. Ferris, Henry Leifert and George L. Long as Trustees, or both certificate holders and the said defendants as Trustees; that the said defendants Joseph W. Ferris, Henry Leifert and George L. Long as Trustees were requested to join in this action as parties plaintiff, but have failed and refused to participate therein; that, therefore, the said defendants Joseph W. Ferris, Henry Leifert and George L. Long as Trustees have been joined as parties defendant.

12. That the question which is the subject of this action is one of common and general interest to all of the holders of certificates in the issue.

13. That the holders of certificates are very numerous; that many of them are not residents of this state; and that it is impracticable to bring all of them before the court.

[fol. 311] 14. The plaintiffs have no adequate remedy at law.

Wherefore plaintiffs demand judgment as follows:

A. That this Court determine the question of whether or not defendant Prudence Realization Corporation as successor to The Prudence Company, Inc., or its Trustees, is entitled to share in the proceeds of the property assigned to defendants Joseph W. Ferris, Henry Leifert and George L. Long as Trustees on a parity with other certificate holders, and whether or not the said defendant Prudence Reali-

zation Corporation is entitled to receive distributions of cash or other property or securities distributable on account of the certificates now held or claimed by it.

B. That this Court determine the rights of the parties with respect to the sum of $21,560.64 held by defendants Joseph W. Ferris, Henry Leifert and George L. Long as Trustees, pending an adjudication of the rights of defendant Prudence Realization Corporation with respect thereto.

C. That plaintiffs have such other, further and additional relief as may be just and proper in the premises.

Albert W. Fribourg, Attorney for Plaintiffs, Office & P. O. Address, 205 East 42nd Street, Borough of Manhattan, City of New York.

(Duly verified.)

[fol. 312] Exhibit "A" Annexed to Complaint (Action No. 2)

Form of Participation Certificate issued by Prudence-Bonds Corporation.

(This is the same as Exhibit "B" annexed to affidavit of William T. Cowin, printed at side fol. 48 herein.)

In Supreme Court of New York, County of New York

[Same Title]

Answer of Prudence Realization Corporation

Defendant Prudence Realization Corporation, by Irving L. Schanzer, its attorney, answering the complaint of Solomon Zauderer, Milton Kimmelman, Irving Zauderer and Charles Kimmelman, doing business as Kimmelman and Zauderer, on behalf of themselves and all other holders of Prudence Bonds Corporation participating certificates of the 307 West 36th Street (Burnside) First Mortgage Participation Certificate issue who shall come in and join as parties to this action, plaintiffs, alleges:

1. Upon information and belief, denies each and every allegation contained in the paragraph of the complaint numbered "10th".

[fol. 313] As and for a separate and distinct defense and for the Purpose of Seeking Affirmative Relief to Determine the Ultimate Rights Among the Defendants Pursuant to Section 264 of the Civil Practice Act, the defendant Prudence Realization Corporation respectfully shows this court and alleges on information and belief:

2. That Prudence Realization Corporation is a corporation duly organized and existing under the Laws of the State of New York.

3. That The Prudence Company, Inc. is a corporation duly organized and existing under the Banking Law of the State of New York.

4. That prior to the commencement of this action, a petition for the reorganization of The Prudence Company, Inc. under Section 77B of the National Bankruptcy Act was approved by order of Hon. Grover M. Moscowitz, United States District Judge for the Eastern District of New York, which said order was dated February 1, 1935 and duly made and entered in the said proceeding entitled: "In the Matter of The Prudence Company, Inc., Debtor. In consolidated proceedings for reorganization under Section 77B of the Bankruptcy Act. Nos. 27496 and 27028." That by the terms of said order Stephen Callaghan, John M. McGrath and William T. Cowin were duly appointed Trustees of The Prudence Company, Inc., Debtor, and only qualified as such trustees. That by orders duly made and entered in the said proceedings for the reorganization of The Prudence Company, Inc., Debtor, dated May 18, 1938 and February 6, 1939, the resignations of Stephen Callaghan and [fol. 314] John M. McGrath, respectively, were accepted and that William T. Cowin is the sole remaining Trustee of The Prudence Company, Inc., Debtor.

5. That by order duly made and entered in said reorganization proceeding by Hon. Grover M. Moscowitz, dated April 25, 1938, it was found, declared, ordered and adjudged that The Prudence Company, Inc., Debtor, was insolvent within the true intent and meaning of Section 77B of the Federal Bankruptcy Act of 1938 as amended.

6. That prior to the commencement of this action and on May 26, 1939, an order was duly made and entered in the said proceedings for the reorganization of The Prudence Company, Inc., Debtor, confirming the Plan of Reorganiza-

tion for the said Debtor which has been proposed by Reconstruction Finance Corporation, and that the said Plan of Reorganization provided for the claims of all creditors of The Prudence Company, Inc., Debtor, including the claims of the various holders of certificates of participation in the Prudence-Bonds First Mortgage Participation Certificates of the 307 West 36th Street (Burnside) Issue.

7. That theretofore and prior to May 26, 1939, pursuant to orders entered in the said proceedings for the reorganization of The Prudence Company, Inc., Debtor, all claimants, including the holders of certificates of participation in the Prudence-Bonds First Mortgage Participation Certificates of the 307 West 36th Street (Burnside) Issue, were required to file proofs of claim in the said reorganization proceeding and that thereafter and prior to May 26, 1939 such [fol. 315] proofs of claim were filed and allowed by the United States District Court for the Eastern District of New York, in the said proceedings for the reorganization of The Prudence Company, Inc., Debtor, none of which claims, however, claimed any preference or priority by reason of the ownership by The Prudence Company, Inc., of certificates in said issue or any other issue.

8. That the said order of May 26, 1939 authorized and directed the transfer of all assets of The Prudence Company, Inc., Debtor, including $431,212.86 of certificates of participation in the mortgage described in the within complaint, to Prudence Realization Corporation, the new company organized pursuant to the provisions of said Plan of Reorganization, and further provided that claims of all creditors of The Prudence Company, Inc., Debtor, should continue as liabilities of Prudence Realization Corporation only to the extent that the assets of said Prudence Realization Corporation shall be sufficient to pay such claims. That pursuant to said order, the assets of The Prudence Company, Inc., including the said $431,212.86 of certificates, were duly transferred to the said Prudence Realization Corporation which is now the owner and holder thereof.

9. That the said Plan of Reorganization for The Prudence Company, Inc., Debtor, and the confirmation order of May 26, 1939, further provided that since the Debtor was insolvent, stockholders of said Debtor corporation should not participate in any distributions thereafter made by Prudence Realization Corporation.

[fol. 316] 10. That the said order of May 26, 1939 and said Plan of Reorganization of The Prudence Company, Inc., Debtor, provided that no priority with respect to any claims of any creditors of The Prudence Company, Inc., Debtor, should exist except to the extent provided in said order and said Plan of Reorganization; that no priority to holders of guarantee claims is provided for therein.

11. That by reason of the foregoing all further liability of The Prudence Company, Inc. upon its guarantee of the certificates of participation in the mortgage described in the complaint is released and discharged.

12. That prior to the commencement of this action, a proceeding for the reorganization of Amalgamated Properties, Inc. under Section 77B of the National Bankruptcy Act was instituted in the United States District Court for the Eastern District of New York, and the petition for its reorganization was approved by order of said Court entered in the said proceeding on March 16, 1936.

13. That among the assets of Amalgamated Properties, Inc. was the property located at 307 West 36th Street, Borough of Manhattan, New York City, which was subject to the mortgage described in the within complaint.

14. That by reason of the fact that The Prudence Company, Inc. and Amalgamated Properties, Inc. were reorganized under the provisions of Section 77B of the National Bankruptcy Act as hereinbefore alleged, the said Act and the decisions of the United States courts interpreting such [fol. 317] Act and applicable thereto are conclusive and binding upon this court and the parties to this action, which said Act exclusively provided for the determination of all rights, claims and priorities affecting the property and assets involved in the aforesaid proceedings including the rights and claims of all holders of certificates of participation of the Prudence-Bonds Corporation First Mortgage Participation Certificates of the 307 West 36th Street (Burnside) Certificate Issue and by reason of the intent and purpose of the provisions of said Act and said decisions, the said certificates presently held by the Prudence Realization Corporation therein are entitled to parity with all holders of certificates in said certificate issue.

Wherefore, defendant Prudence Realization Corporation prays that judgment be entered herein decreeing:

(1) that Prudence Realization Corporation, as holder of certificate of participation in the mortgage described in the complaint is entitled to receive from the plaintiffs herein the principal amounts and interest due on the said certificates on a parity with other certificate holders;

(2) that the plaintiffs herein distribute the said funds in their possession and which shall hereafter come into their possession accordingly;

(3) that the sum received by Prudence Realization Corporation from the Trustee of The Prudence Company, Inc., [fol. 318] representing interest distributions on certificates of participation in the 307 West 36th Street (Burnside) Certificate Issue received by the Prudence Trustes after February 1, 1935, constitutes a corporate asset of Prudence Realization Corporation.

Irving L. Schanzer, Attorney for defendant, Prudence Realization Corporation, Office and Post Office Address, 40 Exchange Place, Borough of Manhattan, City of New York.

(Duly verified.)

[fol. 319] In Supreme Court of New York, County of New York

[Titles Omitted]

Stipulation as to Facts

[fol. 320] It is Hereby Stipulated and Agreed in connection with the motion for summary judgment brought on by notice of motion dated June 5, 1942, that the facts hereinafter set forth may be considered as admitted by the parties hereto:

1: Negotiations for a loan of $25,000,000. from Reconstruction Finance Corporation were instituted by The Prudence Company, Inc. in November, 1931, and the parties to this action may refer to the loan application and balance sheets of The Prudence Company, Inc to show the condition of the corporation at that time.

2: That the certificates and securities shown on Schedule D, attached to Mr. Cowin's affidavit, other than Burnside certificates were of a later maturity date and not in default.

3: The Trustees of The Prudence Company, Inc., appointed by the United States District Court, for the Eastern District of New York, in proceedings for the reorganization of The Prudence Company, Inc. under Section 77B of the Bankruptcy Act, made application in that proceeding for permission of the Court to accept the plan of reorganization relating to the Burnside Issue, and such permission was granted by the Court, and the plan of reorganization was thereupon duly accepted in writing by the Trustees of The Prudence Company, Inc. in the manner prescribed by Section 77B of the Bankruptcy Act. The same procedure was adopted by the Prudence Trustees in connection with their acceptance of the Zo-Gale plan of reorganization.

[fol. 321] 4: The proceedings for the reorganization of Amalgamated Properties, Inc., under Section 77B of the Bankruptcy Act, were never consolidated with the above mentioned proceedings for the reorganization of The Prudence Company, Inc., but the petition for the reorganization of Amalgamated Properties, Inc. as a subsidiary of The Prudence Company, Inc. was filed in the proceedings for the reorganization of The Prudence Company, Inc., and on April 22, 1938, an order was made by the United States District Court, for the Eastern District of New York, severing the proceedings for the reorganization of Amalgamated Properties, Inc. from the proceedings for the reorganization of The Prudence Company, Inc.

5: The Prudence Company, Inc. never filed any claim as a creditor against itself in the proceedings for the reorganization of The Prudence Company, Inc.

6: The Prudence Company, Inc., on January 1, 1932, owned no certificates of the Burnside Issue, but all the certificates now owned by Prudence Realization Corporation, which are set forth in the schedule annexed to the moving papers herein, were acquired subsequent to January 1, 1932.

7: The deposition of W. Allin Bigg, taken on behalf of the plaintiffs, held at Room 2004, No. 40 Exchange Place, New York, N. Y., on Monday, June 22, 1942, at 2:30 P. M., before Benjamin Zatz, Notary Public, and the supplemen-

tary deposition of W. Allin Bigg taken at No. 10 East 40th [fol. 322] Street, New York, N. Y., on July 3, 1942, shall be deemed to be part of this stipulation, and may be referred to by the parties to this action.

It is Hereby Further Stipulated and Agreed that upon the above described motion final judgment may be rendered in favor of any of the parties hereto irrespective of whether the party in whose favor the judgment is rendered has made specific application therefor.

Dated: New York, N. Y., July 7, 1942.

Charles H. Kriger, Attorney for Plaintiffs Joseph W. Ferris et al.

Delafield, Marsh, Porter & Hope, Attorneys for Defendants City Bank Farmers Trust Co. et al.

Irving L. Schanzer, Attorney for Prudence Realization Corporation.

In Supreme Court of New York, New York County

Opinion by Mr. Justice McLaughlin

Ferris, &c., v. Prudence Realization Corp'n, &c. (307 West 36th St.)—This is a motion by the defendant Prudence Realization Corporation for summary judgment. The issues here involve parity between certificates issued to the public and those owned by the Prudence Realization Corporation in the Burnside certificate issue. In addition to [fol. 323] the affidavits there has been submitted to the court a deposition of W. Allin Bigg, Esq., taken for use on this motion. He apparently had been connected with the Prudence Company and testified in detail as to the acquiring and disposition by the company of the certificates.

The Court of Appeals has had before it the question of parity between certificate holders who purchased certificates and the issuing company who afterwards acquired them by repurchase or otherwise. It appears that the rule laid down is that it requires, in the first instance, clear and unequivocal language showing that a parity is intended if the company is to share equally with the certificate holders who purchased the certificates. Secondly, even though such language appears in the instrument itself, the actions of the company must show that the company intended to issue to itself these participating certificates and hold the certi-

ficates in the same manner as the owners who purchased them did (Matter of People, &c. (Union Guar. & Mort. Co.), 285 N. Y., 337, at 344). If it were assumed in this case that the language is clear and convincing as to the right of parity on the part of the company, nevertheless, the testimony of W. Allin Bigg does not show that certificates were issued by the company to itself so that it could be on a parity with the other certificate holders. It may be that such testimony can be produced upon a trial, but this motion by the moving defendant for summary judgment must upon these papers be denied.

[fol. 324] In Supreme Court of New York, Appellate Division— First Department

Stipulation Waiving Printing of Certain Exhibits

* * * * * * *

[fol. 325] It is hereby stipulated and agreed, by and between the attorneys for the respective parties hereto, in order to avoid the expense of printing, that the following exhibits be omitted from the printed record on appeal herein, to wit:

Declaration of Trust dated as of July 1, 1938.

The exhibit designated the offering sheet and offered at page 4 of the deposition of W. Allin Bigg.

And it is further stipulated that upon the argument of the appeal herein, either of the parties may hand the Court one or more printed copies of each of the above enumerated exhibits.

Dated, New York, January 30, 1943.

Irving L. Schanzer, Attorney for Defendant-Appellant-Respondent Prudence Realization Corporation.

Delafield, Marsh, Porter & Hope, Attorneys for Defendants-Respondents-Appellants City Bank Farmers Trust Company et al.

Charles H. Kriger, Attorney for Plaintiffs-Respondents-Appellants Joseph W. Ferris et al.

Albert Fribourg, Attorney for Respondents Zanderer et al.

So ordered.

F. M.

[fol. 326] STIPULATION WAIVING CERTIFICATION

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, the order appealed from, and all the papers upon which the Court below acted in making said order appealed from, and the whole thereof, now on file in the office of the Clerk of the County of New York; and certification thereof by said Clerk, pursuant to Section 616 of the Civil Practice Act, is hereby waived.

Dated, New York, February 19th, 1943.

Irving L. Schanzer, Attorney for Defendant-Appellant-Respondent Prudence Realization Corporation.

Delafield, Marsh, Porter & Hope, Attorneys for Defendants-Respondents-Appellants City Bank Farmers Trust Company et al.

Charles H. Kriger, Attorney for Plaintiffs-Respondents-Appellants Joseph W. Ferris et al.

Albert Fribourg, Attorney for Respondents Zauderer et al.

[fol. 327] IN SUPREME COURT OF NEW YORK, NEW YORK COUNTY

[Titles omitted]

NOTICE OF APPEAL TO COURT OF APPEALS BY PLAINTIFFS FERRIS ET AL.

[fol. 328] SIRS:

Please take notice that the plaintiffs in Action #1, Joseph W. Ferris, George L. Long and Henry Leifert as Trustees under a Declaration of Trust dated as of July 1st, 1938 with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificate, hereby appeal to the Court of Appeals of the State of New York from the judgment entered in the office of the Clerk of the County of New York on the 5th day of August, 1943 in the above entitled action and from the order of the Appellate Division of the State of New York, First Judicial Department, bearing date the 2nd day of July, 1943 and filed in the office of the Clerk of the Appellate Division, First Department, on the 21st day

of July, 1943, and the said appeal is taken from each and every part of said judgment and said order as well as the whole thereof.

Dated, Brooklyn, New York, August 9, 1943.

Yours, etc., Charles H. Kriger, Attorney for Plaintiffs Joseph W. Ferris, et al., Office & P. O. Address, 66 Court Street, Borough of Brooklyn, City of New York.

[fol. 329] To: Irving L. Schanzer, Esq., Attorney for Prudence Realization Corporation, 40 Exchange Place, New York City.

Delafield, Marsh, Porter & Hope, Esqs., Attorneys for Defendants City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees, etc., 20 Exchange Place, New York City.

Archibald R. Watson, Clerk of New York County.

[fol. 330] In Supreme Court of New York, New York County

[Titles omitted]

Notice of Appeal to Court of Appeals by Defendants City Bank Farmers Trust Company et al.

[fol. 331] Sirs:

Please take notice that the defendants City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees under the last Will and Testament of Herman Stutzer, deceased, on behalf of themselves and other holders of certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, and such other holders as may appear or come in and defend this action, hereby appeal to the Court of Appeals of the State of New York from the judgment of reversal entered in the Office of the Clerk of the County of New York on the 5th day of August, 1943 in the above entitled action, and from the order of the Appellate Division, First Department, bearing date the 2nd day of July, 1943, and filed in the Office of the Clerk of said

Appellate Division on the 21st day of July, 1943; and this appeal is from each and every part of said judgment.

Dated, New York, September 9, 1943.

Yours, etc., Delafield, Marsh, Porter & Hope, Attorneys for City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees, etc., on behalf of themselves and other holders of certificates, etc., Office & P. O. Address, 20 Exchange Place, Borough of Manhattan, City of New York.

[fol. 332] To: Charles H. Kriger, Esq., Attorney for Plaintiffs Joseph W. Ferris, et al., Office & P. O. Address, 66 Court Street, Brooklyn, New York.

Irving L. Schanzer, Esq., Attorney for Prudence Realization Corporation, 40 Exchange Place, New York City.

Archibald R. Watson, Clerk of New York County.

[fol. 333] In Supreme Court of New York, Appellate Division

Present: Hon. Francis Martin, Presiding Justice, Hon. Alfred H. Townley, Hon. Irwin Untermyer, Hon. Albert Cohn, Hon. Joseph M. Callahan, Justices.

Joseph W. Ferris, George L. Long and Henry Leifert, as Trustees under a Declaration of Trust dated as of July 1st, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, Plaintiffs-Respondents-Appellants,

against

Prudence Realization Corporation, Defendant-Appellant-Respondent,

City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees under the Last Will and Testament of Herman Stutzer, deceased, Defendants-Respondents-Appellants,

and Irving Zauderer on behalf of themselves and other holders of certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, and such other holders as may appear or come in and defend this action, Defendants-Respondents.

Action #1

[fol. 334] Solomon Zauderer, Milton Kimmelman, Irving Zauderer and Charles Kimmelman, doing business as Kimmelman and Zauderer, on behalf of themselves and all other holders of Prudence Bonds Corporation participating certificates of the 307 West 36th Street (Burnside) First Mortgage Participation Certificate Issue who shall come in and join as parties to this action, Plaintiffs,

against

Prudence Realization Corporation and George L. Long, Henry Leifert and Joseph W. Ferris, as Trustees under a Declaration of Trust dated as of July 1, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, Defendants.

Action #2

Order Appealed from—July 2, 1943

The above named Prudence Realization Corporation defendant, having appealed to the Appellate Division of the Supreme Court for the First Judicial Department, from an order made and entered in the Supreme Court, New York County, in the above entitled action, dated November 11, 1942, which order denied the motion of the Defendant Prudence Realization Corporation to dismiss the complaint under Rule 11e of the Rules of Civil Practice, and Joseph W. Ferris, George L. Long, and Henry Leifert, as Trustees, plaintiffs, having appealed from so much of said order as failed to grant judgment to the plaintiffs in said action for the relief demanded in the complaint, and City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees, having appealed from so much of said order as fails to [fol. 335] grant judgment in accordance with the relief demanded in the answer of the said defendants, and said appeals having been argued by Irving L. Schanzer, Esq., counsel for Prudence Realization Corporation, defendant-appellant-respondent, and by Charles H. Kriger, Esq., counsel for Joseph W. Ferris, George L. Long and Henry Leifert, as Trustees, plaintiffs-respondents-appellants, and Eugene Blanc, Jr., Esq., of counsel for City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees, defendants-respondents-appellants, and due deliberation having been had thereon, it is

Ordered, that the order denying the motion of Prudence Realization Corporation for summary judgment, appealed from, be unanimously reversed upon questions of law with $20 costs and disbursements in favor of Prudence Realization Corporation against Joseph W. Ferris, George L. Long and Henry Leifert, as Trustees, and City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees, and that judgment be directed in favor of Prudence Realization Corporation as prayed for in its answers, and it is further

Ordered, that in so far as the order denies summary judgment to defendants City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees, and to Joseph W. Ferris, George L. Long and Henry Leifert, as Trustees, the said order be unanimously affirmed.

Enter,

A. C.

[fol. 336] In Supreme Court of New York, New York County

Joseph W. Ferris, Henry Leifert and George L. Long, as Trustees under a Declaration of Trust dated as of July 1st, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, Plaintiffs,

against

Prudence Realization Corporation City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees under the Last Will and Testament of Herman Stutzer, deceased, and Irving Zauderer on behalf of themselves and other holders of certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, and such other holders as may appear or come in and defend this action, Defendants.

Action #1

Solomon Zauderer, Milton Kimmelman, Irving Zauderer and Charles Kimmelman, doing business as Kimmelman and Zauderer, on behalf of themselves and all other holders of Prudence Bonds Corporation participating certificates of the 307 West 36th Street (Burnside) First Mortgage Participation Certificate Issue who shall come in and join as parties to this action, Plaintiffs,

against

Prudence Realization Corporation and Joseph W. Ferris, Henry Leifert and George L. Long, as Trustees under a Declaration of Trust dated as of July 1, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, Defendants.

Action #2

Judgment Entered Pursuant to Order of Appellate Division Appealed from

[fol. 337] The above named Prudence Realization Corporation having appealed to the Appellate Division of the Supreme Court for the First Judicial Department from an order made and entered in the Supreme Court, New York County, in the above entitled action, dated November 11,

1942, which order denied the motion of the defendant Prudence Realization Corporation to dismiss the complaint under Rule 113 of the Rules of Civil Practice, and Joseph W. Ferris, George L. Long and Henry Leifert, as Trustees, plaintiffs, having appealed from so much of said order as failed to grant judgment to the plaintiffs in said action for the relief demanded in the complaint, and City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees, having appealed from so much of said order as failed to grant judgment in accordance with the relief demanded in the answer of the said defendants,

And the said appeal having been heard in the Appellate Division of the Supreme Court for the First Judicial Department, and after due deliberation the said Appellate Division unanimously having ordered, by order made the 2nd day of July, 1943 and entered in the office of the Clerk of the Appellate Division for the First Judicial Department on July 21, 1943, that the said order of the Supreme Court, New York County, dated November 11, 1942, denying said motion of Prudence Realization Corporation for summary judgment be unanimously reversed upon questions of law with $20 costs and disbursements and the judgment be directed in favor of Prudence Realization [fol. 338] Corporation as prayed for in its answers, and further having ordered that, in so far as the said order denies summary judgment to the defendants City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees, and to Joseph W. Ferris, George L. Long and Henry Leifert, as Trustees, plaintiffs, the said order be unanimously affirmed,

Now, it is, on motion of Irving L. Schanzer, attorney for the defendant Prudence Realization Corporation,

Adjudged and decreed that Prudence Realization Corporation as holder of certificates of participation in the mortgage described in the complaint, is entitled to receive from the plaintiffs herein principal amounts and interest due on the said certificates on a parity with other certificate holders, and it is further

Adjudged and decreed, that the plaintiffs herein distribute the said funds in their possession and which shall hereafter come into their possession accordingly, and it is further

Adjudged and decreed, that the sum received by Prudence Realization Corporation from the Trustee of The

Prudence Company, Inc., representing interest distributions on certificates of participation in the 307 West 36th Street (Burnside) Certificate Issue, received by the Prudence Trustees after February 1, 1935, constitutes a corporate asset of Prudence Realization Corporation, and it is further

[fol. 339] Adjudged, that the defendant Prudence Realization Corporation recover of the said plaintiffs, Joseph W. Ferris, George L. Long and Henry Leifert, as Trustees under a Declaration of Trust dated as of July 1st, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, and of the said defendants City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees under the Last Will and Testament of Herman Stutzer, deceased, the sum of Four Hundred Sixty Three and 36/100 ($463.36) dollars costs and disbursements as taxed and that the said Prudence Realization Corporation have execution therefor.

Dated, New York, New York, August 5th, 1943.

Archibald R. Watson, Clerk.

[fol. 340] In Supreme Court of New York

Appellate Division—First Department

June, 1943

Francis, Martin, P.J., Alfred H. Townley, Irwin Untermeyer, Albert Cohn, Joseph M. Callahan, JJ.

13294

Joseph W. Ferris, George L. Long and Henry Leifert, as Trustees under a Declaration of Trust dated as of July 1st, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, Pltfs.-Respts.-Applts.,

vs.

Prudence Realization Corporation, Deft.-Applt.-Respt.,

City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees under the Last Will and Testament of Herman Stutzer, deceased, Defts.-Respts.-Applts.,

and Irving Zauderer on behalf of themselves and other holders of certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, and such other holders as may appear or come in and defend this action, Defts.-Respts.

(Action No. 1)

[fol. 341] Solomon Zauderer, Milton Kimmelman, Irving Zauderer and Charles Kimmelman, doing business as Kimmelman and Zauderer, on behalf of themselves and all other holders of Prudence Bonds Corporation participating certificates of the 307 West 36th Street (Burnside) First Mortgage Participation Certificate Issue who shall come in and join as parties to this action, Plaintiffs,

vs.

Prudence Realization Corporation and Joseph W. Ferris, Henry Leifert and George L. Long, as Trustees under a Declaration of Trust dated as of July 1, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, Defendants

(Action No. 2)

Appeal by Prudence Realization Corporation, defendant in Action No. 1 and Action No. 2, from an order of the Su-

preme Court, New York County, denying its motion for an order, pursuant to Rule 113 of the Rules of Civil Practice, dismissing the complaints herein, striking out the answers of City Bank Farmers Trust Company and Martin S. Lindgrove as trustees, etc., and of Realty Associates Securities Corporation, and directing that judgment be entered herein in favor of the defendant Prudence Realization Corporation as prayed for in the answers interposed by said defendant, Prudence Realization Corporation.

Appeal by defendants, City Bank Farmers Trust Company and Martin S. Lindgrove, as trustees, etc., from so [fol. 342] much of said order as fails to grant judgment in accordance with the relief demanded in the answer of said defendants.

Appeal by Joseph W. Ferris, George L. Long and Henry Leifert, as trustees, etc., plaintiffs in Action No. 1, from so much of said order as failed to grant judgment to plaintiffs, in said action for the relief demanded in the complaint.

Irving L. Schanzer, for defendant-appellant Prudence Realization Corporation.

Eugene Blanc, Jr., of counsel (Delafield, Marsh, Porter & Hope, attorneys), for defendant-respondents City Bank Farmers Trust Company and Martin S. Lindgrove.

Charles H. Kriger, for plaintiffs-respondents-appellants.

OPINION

Per CURIAM:

All parties have agreed that no further proof can be adduced upon a trial and that summary judgment on the pleadings and the proof will expedite the determination of the question presented.

The Prudence Company, Inc., the predecessor of Prudence Realization Corporation, and the certificate issue involved have been reorganized in the federal court in proceedings conducted under Section 77B of the Bankruptcy Act. The controversy here is as to whether The Prudence Company, Inc., the insolvent defaulting guarantor of participation certificates in a mortgage, which is also the owner of a part of the mortgage indebtedness, may share equally [fol. 343] with other certificate holders in the distribution

of the proceeds of the mortgage. In the circumstances, this is a federal question determinable in accordance with federal law even though the rights are sought to be adjudicated in a state court. The case, accordingly, must be decided in the light of decisions which prevail in the federal courts. (Sola Electric Co. v. Jefferson Electric Co., U. S., 63 Sup. Ct. 172; Frank v. Mercantile National Bank, 182 N. Y. 264, 268, 269; Brenen v. Dahlstrom Metallic Door Co., 189 App. Div. 685, 688.) Under the Bankruptcy Act and the equitable principles governing bankruptcy proceedings, an insolvent defaulting guarantor of certificates of participation in a mortgage who is also the owner of a part of the mortgage indebtedness is entitled to share *pro rata* in the distribution of the proceeds of the mortgage in a 77B proceeding. (Prudence Corp. v. Geist, 316 U. S. 89.) Prudence Realization Corporation as the holder of participation certificates in the mortgage involved is, therefore, entitled to receive from plaintiffs the principal amounts and interest due on said certificates on a parity with other certificate holders.

The order denying the motion of Prudence Realization Corporation for summary judgment should be reversed with $20 costs and disbursements, and judgment should be directed in its favor as prayed for. In so far as the order denies summary judgment to defendants City Bank Farmers Trust Company and Martin S. Lindgrove, as trustees, and to plaintiffs-appellants, it should be affirmed.

[fol. 344] STIPULATION WAIVING CERTIFICATION IN COURT OF APPEALS

Pursuant to Section 170 of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the original papers before the Supreme Court and the Appellate Division of the Supreme Court, First Department, upon which the Appellate Division of the Supreme Court, First Department, acted in making the order and judgment appealed from, together with the opinion of the Appellate Division of the First Department, the order of the Appellate Division, First Department, the judgment entered pursuant to such order and the notices of appeal, all of which papers are now on file in the office of the Clerk of the County of New York; and certification

thereof by said Clerk, pursuant to Section 616 of the Civil Practice Act, is hereby waived.

Dated, New York, September 30, 1943.

Charles H. Kriger, Attorney for Plaintiff-Appellant Joseph W. Ferris et al. Delafield, Marsh, Porter & Hope, Attorneys for Defendants-Appellants City Bank Farmers Trust Company et al. Irving L. Schanzer, Attorney for Defendant-Respondent Prudence Realization Corporation.

[fol. 345] In Court of Appeals of New York

Remittitur—March 10, 1944

Joseph W. Ferris & ors, as Trustees &c., Appellants,

vs.

Prudence Realization Corporation, Respondent.

City Bank Farmers Trust Company & ano, as Trustees, &c., Impld., &c., Defendant-Appellants

(Action #1)

Solomon Zauderer & ors, Doing Business, &c., Plaintiffs,

vs.

Prudence Realization Corporation & ors, as Trustees, &c., Defendants

(Action #2)

[fol. 346] Be it remembered, That on the 27th day of November in the year of our Lord one thousand nine hundred and forty-three, Joseph W. Ferris and others as trustees, &c., and others, the appellants in this cause came here unto the Court of Appeals by Charles H. Kriger and others, their attorneys, and filed in the said Court Notices of Appeal and a return thereto from the judgment and order of the Appellate Division of the Supreme Court in and for the First Judicial Department. And Prudence Realization Corporation, the respondent in said cause, afterwards appeared in said Court of Appeals by Irving L. Schanzer, its attorney.

Which said Notices of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, the said Court of Appeals having heard this cause argued by Messrs. Charles H. Kriger and Eugene Blanc, Jr., of counsel for the appellants, and by Mr. Irving L. Schanzer, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and judgment directed in accordance with the opinion herein, with costs in this court and in the Appellate Division to the plaintiffs-appellants and defendants-appellants in Action No. 1.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the said Supreme Court, there to be proceeded upon according to law.

[fol. 347] Therefore, it is considered that the said judgment of the Appellate Division be reversed and judgment directed in accordance with the opinion herein, &c., as aforesaid.

And hereupon, as well the Notices of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

John Ludden, Clerk of the Court of Appeals of the State of New York.

Court of Appeals, Clerk's Office,
Albany, March 10, 1944:

I hereby certify, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

John Ludden, Clerk. (Seal.)

[fol. 348] In Supreme Court of New York, County of New York

Joseph W. Ferris, George L. Long and Henry Leifert, as Trustees under a Declaration of Trust Dated as of July 1st, 1938, With Respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, Plaintiffs-Appellants,

against

Prudence Realization Corporation, Defendant-Respondent

City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees under the last Will and Testament of Herman Stutzer, deceased, on behalf of themselves and other holders of certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, and such other holders as may appear or come in and defend this action, Defendants-Appellants, and Irving Zauderer, Defendant

Action #1

[fol. 349] Solomon Zauderer, Milton Kimmelman, Irving Zaunderer and Charles Kimmelman, Doing Business as Kimmelman and Zauderer, on Behalf of Themselves and All Other Holders of Prudence Bonds Corporation Participating Certificates of the 307 West 36th Street (Burnside) First Mortgage Participation Certificate Issue Who Shall Come in and Join as Parties to This Action, Plaintiffs,

against

Prudence Realization Corporation and Joseph W. Ferris, Henry Leifert and George L. Long, as Trustees under a Declaration of Trust Dated as of July 1, 1938, With Respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, Defendants

Action #2

Order on Remittitur—April 14, 1944

The above named plaintiffs Joseph W. Ferris, George L. Long and Henry Leifert as Trustees under a Declaration of Trust dated as of July 1, 1938 with respect to 307 West

36th Street, (Burnside) First Mortgage Participation Certificates, and the defendant City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees under the last Will and Testament of Herman Stutzer, having appealed to the Court of Appeals from the judgment of the Appellate Division of the Supreme Court, First Department, bearing date the 5th day of August, 1943, and the said appeals having been argued at the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment so appealed from, be reversed and judgment directed in accordance [fol. 350] with the opinion of the Court of Appeals, with costs in the Court of Appeals and in the Appellate Division to the plaintiffs-appellants and defendants-appellants in Action #1, and having further ordered and adjudged that the proceedings be remitted to the Supreme Court there to be proceeded upon according to law, and the remittitur from the said Court of Appeals having been presented herein,

Now, upon reading and filing the remittitur from the said Court of Appeals and on motion of Charles H. Kriger, attorney for the plaintiffs, it is hereby

Ordered that the order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this Court.

Enter, B. B., J. S. C.

[fol. 351] In Supreme Court of New York, New York County

Joseph W. Ferris, George L. Long and Henry Leifert, as Trustees under a Declaration of Trust Dated as of July 1st, 1938, With Respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, Plaintiffs-Appellants,

against

Prudence Realization Corporation, Defendant-Respondent;

City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees under the Last Will and Testament of Herman Stutzer, Deceased, on Behalf of Themselves and Other Holders of Certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, and Such Other Holders as May Appear or Come in and Defend This Action, Defendants-Appellants,

and

Irving Zauderer, Defendant

Action #1

[fol. 352] Solomon Zauderer, Milton Kimmelman, Irving Zauderer and Charles Kimmelman, Doing Business as Kimmelman and Zauderer, on Behalf of Themselves and All Other Holders of Prudence Bonds Corporation Participating Certificates of the 307 West 36th Street (Burnside) First Mortgage Participation Certificate Issue Who Shall Come in and Join as Parties to This Action, Plaintiffs,

against

Prudence Realization Corporation and Joseph W. Ferris, Henry Leifert and George L. Long, as Trustees under a Declaration of Trust Dated as of July 1, 1938, With Respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, Defendants

Action #2

Judgment—April 20, 1944

The above named plaintiffs Joseph W. Ferris, George L. Long and Henry Leifert as Trustees under a Declara-

tion of Trust dated as of July 1, 1938 with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, and the defendant City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees under the Last Will and Testament of Herman Stutzer, deceased, having appealed to the Court of Appeals from the judgment of the Appellate Divisions of the Supreme Court, First Department, bearing date the 5th day of August, 1943, and the said appeals having been argued at the said Court of Appeals, and after due deliberation the Court of Appeals having ordered and adjudged that the said judgment so ap-
[fol. 353] pealed from, be reversed and judgment directed in accordance with the opinion of the Court of Appeals with costs in the Court of Appeals and in the Appellate Division to the plaintiffs Joseph W. Ferris, George L. Long and Henry Leifert as Trustees under a Declaration of Trust dated as of July 1, 1938 with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, and defendants City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees under the last Will and Testament of Herman Stutzer, deceased, and having further ordered and adjudged that the proceedings be remitted to the Supreme Court there to be proceeded upon according to law, and the remittitur from the said Court of Appeals having been filed herein and an order having been made making the said order and judgment of the Court of Appeals the order and judgment of this court,

Now, on motion of Charles H. Kriger, attorney for the plaintiffs, it is

Ordered, adjudged and decreed that the said order and judgment of the Court of Appeals be and the same hereby are made the order and judgment of this court; and it is further

Ordered, adjudged and decreed that the judgment of the Appellate Division of the Supreme Court, First Judicial Department, entered herein on the 5th day of August, 1943, be and the same hereby is reversed; and it is further

Ordered, adjudged and decreed that the mortgage participation certificates in the 307 West 36th Street (Burn-
[fol. 354] side) mortgage held by the defendant Prudence Realization Corporation are subordinate to those held by others; and it is further

Ordered, adjudged and decreed that the defendant Prudence Realization Corporation turn over to Joseph W. Ferris, George L. Long and Henry Leifert as Trustees under the Declaration of Trust dated as of July 1, 1938 with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, all moneys held by the said defendant Prudence Realization Corporation on account of any of the Burnside Participation certificates; and it is further

Ordered, adjudged and decreed that the plaintiffs Joseph W. Ferris, Henry Leifert and George L. Long as Trustees under a Declaration of Trust dated as of July 1, 1938 with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates have and recover of the defendant Prudence Realization Corporation the sum of $334.42 costs and disbursements as taxed by the Clerk and that the said plaintiffs have execution therefor; and it is further

Ordered, adjudged and decreed that the defendants City Bank Farmers Trust Company and Martin S. Lindgrove as Trustees under the last Will and Testament of Herman Stutzer, deceased, have and recover of the defendant Prudence Realization Corporation the sum of $204.51, costs and disbursements as taxed by the Clerk and that the said City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees under the last will and Testament of Herman [fol. 355] Stutzer, deceased, have execution therefor; and it is further

Ordered, Adjudged and Decreed that jurisdiction of the above entitled action is retained for the purpose of any proceedings that may become necessary in order to carry out the provisions of this judgment; for any instructions that may become necessary to the plaintiff with respect to the distribution of the funds directed by this judgment to be paid to the plaintiffs; and to fix and allow reasonable expenses, fees and charges in connection with this action and make appropriate direction for the payment thereof.

Enter,

B. B., *J. S. C.*

Archibald R. Watson, Clerk.

Filed and Docketed April 24, 1944 at 12 o'clock & 40 M. P. M.

[fols. 356-358] Certificates to opinion omitted in printing.

[fol. 359] In Court of Appeals of New York

Joseph W. Ferris et al., as Trustees, Appellants,

v.

Prudence Realization Corporation, Respondent

City Bank Farmers Trust Company et al., as Trustees, Appellants, et al., Defendants

Action No. 1

Solomon Zauderer et al., Doing Business as Kimmelman and Zauderer, on Behalf of Themselves and Others, Plaintiffs,

v.

Prudence Realization Corporation et al., Defendants

Action No. 2

Opinion

Decided March 10, 1944

Thacher, J.:

These consolidated actions arose under a plan for the reorganization in bankruptcy of guaranteed mortgage participation certificates known as the Burnside issue which [fol. 360] was confirmed by the United States District Court for the Eastern District of New York on June 14, 1938, in proceedings for the reorganization in bankruptcy of Amalgamated Properties, Inc. (hereinafter called Amalgamated). Before the confirmation of the plan, these proceedings were on April 22, 1938, severed from similar proceedings for the reorganization of The Prudence Company, Inc. (hereinafter called Prudence). Under a plan for the reorganization of another issue of guaranteed mortgage participation certificates questions similar to those involved here were raised in the reorganization court and were ultimately decided by the Supreme Court of the United States in *Prudence Corp* v. *Geist* (316 U. S. 89) and we are confronted at the outset by the contention that that case is controlling here. It is therefore necessary to consider the proceedings in the Federal courts in that case, the proceedings in bankruptcy with reference to the Burnside issue and the terms and conditions of the Burnside plan of reor-

ganization pursuant to which these suits were brought in the Supreme Court of this State.

The decision of the United States Supreme Court in *Prudence Corp.* v. *Geist* (*supra*) *was rendered in consolidated* reorganization proceedings for the reorganization in bankruptcy of Prudence and Amalgamated. The particular proceeding under review in that case related to the reorganization of an issue of guaranteed mortgage participation certificates known as the Zo Gale Realty Co. issue. In connection with that issue Prudence, the guarantor of the certificates, claimed parity of payment [fol. 361] of certificates purchased by it from the proceeds of assets received by Amalgamated on account of the mortgage debt. It was held that Prudence in bankruptcy reorganization was entitled to such parity of payment on the certificates purchased by it, notwithstanding the decision of this court in *Matter of Lawyers Title & Guaranty Co.* (287 N. Y. 264); *Matter of People* (*Union Guar. & Mtg. Co.*), (285 N. Y. 337); *Pink* v. *Thomas* (282 N. Y. 10); *Matter of Title & Mortgage Guaranty Co.* (275 N. Y. 347); *Title Guarantee & Trust Co.* v. *Mortgage Commission* (273 N. Y. 415); *Matter of Lawyers Mortgage Co.* (*545 West End Ave.*), (272 N. Y. 554); *Matter of New York Title & Mortgage Co.* (272 N. Y. 556).

The Supreme Court held that there was no basis for the conclusion of the Circuit Court of Appeals that it was bound to apply, as "a rule of construction of the guaranty of the certificates," the rule announced in New York; that there was no evidence of actual intent to subordinate certificates owned by Prudence, and that, so far as the New York cases, without evidence of the actual intent of the parties, subordinate the guarantor on grounds of "presumed intention," or "the existence of special equities," or the "natural equities" involved, the rule laid down is one of State law governing the relative rights of claimants in a State liquidation (316 U. S. 93, 95).

The suits in the State court which are now before us are not proceedings in bankruptcy nor are they state liquidation proceedings. Each is brought to determine relative rights in property held for the satisfaction of a mortgage. Such rights, if not determined or defined by provisions of a plan [fol. 362] of reorganization predicated upon the consents required by the Bankruptcy Act and approved by the bankruptcy judge as "fair and equitable," must be determined

by the law of New York where the land is situated and where the bond and mortgage, the participation certificates and the agreement of guaranty were made and delivered. Accordingly, it becomes necessary for us to consider whether any provision of an approved plan of reorganization or any order of the bankruptcy court has determined or defined the relative rights of Prudence and other certificate holders to share in the security of the mortgage or in sums received on account of the mortgage debt. We find none in this record, which, so far as pertinent, may be summarized as follows:

Action No. 1 was brought by the trustee named in the declaration of trust required by the plan for the reorganization of the Burnside issue. This plan was confined to reorganization of the certificated bond and mortgage and the certificates. It did not embrace in its scope anything other than the mortgaged property,—307 West 36th Street in the City of New York,—the personal property therein owned by Amalgamated, the certificated bond and mortgage, the certificates, and any other money or property to which the certificate holders were entitled. All rights of action against the obligor upon the bond and against Prudence, pursuant to its agreement of guaranty, were expressly reserved. With reference to the payment of certificates acquired by Prudence, the plan as amended contained the following reservation:

> "A question has arisen with respect to the rights of [fol. 363] The Prudence Company, Inc., or its Trustees on account of the certificates held or claimed by them, including so-called 'unissued certificates.' Anything in the Plan to the contrary notwithstanding, the Trustees to be appointed hereunder shall make no distributions of cash or other property or securities which would be otherwise distributable on account of the certificates now held or claimed by The Prudence Company, Inc., or its Trustees, including said 'unissued certificates,' unless and until it shall have been finally adjudicated by a Court of competent jurisdiction whether or not The Prudence Company, Inc. or its Trustees, or their successors or assigns, are entitled to receive such cash or other property or securities and to share in the proceeds of the property to be assigned to the Trustee pursuant to the Plan and on a parity with other certificate holders or otherwise. The actual distribution of such

cash, securities or other property shall be made in accordance with such final adjudication. Pending such final adjudication the Trustee to be appointed pursuant to the Plan shall hold in escrow the share of any cash, property or other securities distributed under the Plan to which the certificates held by The Prudence Company, Inc., or its Trustees, including said 'unissued certificates,' would be entitled if owned and held by persons other than The Prudence Company, Inc., or its Trustees."

Among the defendants named were Prudence Realization Corporation (herein called Realization Corporation), which [fol. 364] holds legal title to the assets formerly owned by Prudence, including certificates of the Burnside issue. The defendants other than Realization Corporation were sued as representatives of holders of Burnside certificates.

Plaintiffs acknowledged that they were holding as trustees the bond and mortgage, the title to the mortgaged premises 307-13 West 36th Street without merger of the mortgage with the fee and that the rights of the holders of mortgage participation certificates in and to the bond and mortgage and in and to the guarantee of Prudence were assigned to plaintiffs as trustees, who also hold the guaranty and the sum of $26,950.80 distributable to certificate holders when the relative rights of Prudence and of other certificate holders have been determined.

The relief sought was a judgment declaring the rights and interests of Realization Corporation and all other certificate holders in and to the corpus and income of the trust estate and an accounting by Realization Corporation for moneys distributed to or held by it or by Prudence on account of Burnside certificates.

Action No. 2 was brought by Kimmelman and Zauderer, a firm holding Burnside certificates, against Realization Corporation and Ferris et al., the plaintiffs in Action No. 1. The relief sought is similar to that prayed for in Action No. 1. Actions Nos. 1 and 2 were consolidated.

Special Term held that an issue of fact was presented and denied summary judgment. Realization Corporation, City Bank Farmers Trust Company and Lindgrove, as trustees, and plaintiffs in Action No. 1 appealed. The Appellate Division reversed on the law the order denying Realization [fol. 365] Corporation's motion for summary judgment and

granted such judgment. It affirmed the order insofar as it denied judgment to City Bank and Lindgrove and to plaintiffs in Action No. 1.

Under the reservations in the Burnside plan, the question of parity of payment upon the certificates held by Realization Corporation remained undecided when the plan, as amended, was finally confirmed on June 14, 1938. Upon confirmation the court retained exclusive jurisdiction for certain stated purposes, but, in view of the language quoted above with regard to the determination of the question of parity "by a court of competent jurisdiction," did not retain exclusive jurisdiction to determine the question of parity. On December 27, 1940, an order was made in the Bankruptcy Court which "terminated and finally closed" the bankruptcy proceedings with respect to the Burnside issue, and on January 17, 1941, an order was made terminating the entire proceeding for the reorganization of Amalgamated with the single exception of the motion then pending before the District Court in the *Geist* case. The latter order read: "Ordered, Adjudged and Decreed that the debtor, Amalgamated Properties, Inc., is hereby discharged from the control and supervision of this Court * * * and these proceedings shall hereafter be treated as dismissed for all purposes except the determination of the questions raised in the pending motion of A. Joseph Geist, the Trustee appointed by this Court pursuant to the plan of reorganization herein for the certificated mortgage on premises known as 202 Riverside Drive, Borough of Manhattan, City and [fol. 366] State of New York (Zo-Gale Issue), for determination of the relative priorities in said certificated mortgage of the certificates held by Prudence Realization Corporation and the certificates held by the public."

Shortly after the entry of this order the pending actions were commenced on February 26th and 25th, 1941, respectively.

Upon this record it appears without contradiction that the Burnside plan of reorganization did not attempt to define or determine the relative rights of Realization Corporation as the holder of certificates acquired by Prudence and of other holders of Burnside certificates, nor was any determination of these rights made in the Bankruptcy Court in the course of its administration or in connection with the distribution of any of the assets either of Prudence or of

Amalgamated. The controversy, therefore, was brought to the State courts, as contemplated by the plan of reorganization, for determination of these relative rights unaffected by the reorganization consummated in the Federal court.

Corporate reorganization in the Federal courts is a process of adjustment and modification of legal rights frequently involving the impairment of contractual obligations under plans predicated upon the consent of security holders and creditors and upon the court's approval of the plan as fair and equitable and therefore binding upon the minority. If neither the plan nor any order in the proceeding undertakes to modify the legal rights but leaves those rights to be determined by courts of competent jurisdiction, such courts have no power to impair the legal or equitable rights of the [fol. 367] parties. The court below erroneously regarded the *Geist* case as establishing a rule. It was only effective in determining a question affecting the administration and distribution of assets in the particular reorganization before the court. To conclude that our decision is ruled by the decision of the Supreme Court in the *Geist* case, we should have to modify the Burnside plan of reorganization, which did not undertake to determine, define or modify the relative rights of certificate holders under the Burnside mortgage.

It is therefore necessary for us to determine for ourselves whether or not under the decisions of this State Prudence was entitled to parity of treatment for its certificates with the certificates held by others in this mortgage.

The certificates here in question were created and issued in the following manner: In June of 1927 Prudence was the owner of a bond and mortgage in the sum of $1,200,000, reduced by payments to $1,100,000, made by the Burnside Improvement Co. Inc. The mortgagor had agreed with Prudence to pay interest at six per cent and amortization of $12,000 payable semiannually. This bond and mortgage Prudence assigned to its wholly owned affiliate, Prudence-Bonds Corporation, in order that it might issue mortgage participation certificates therein bearing its guarantee as to principal and interest at five and one-half per cent. Prudence-Bonds Corporation entered into a deposit agreement with the Bank of America dated June 25, 1927, pursuant to which the bond and mortgage were assigned to the bank. Prudence in turn executed, acknowledged and delivered to the bank its agreement guaranteeing to each

[fol. 368] holder of participation certificates payment of interest when due and payment of principal when due or within eighteen months thereof. The deposit agreement contains the following provision:

"The Bond and Mortgage, an appraisal showing the value of the real property covered by said mortgage to be at least fifty per centum more than the amount of said mortgage, the guarantee of The Prudence Company, Inc., guaranteeing to the holders of the certificates payment of principal and interest, and the insurance policies and other instruments and evidences of title relating thereto are and shall continue to be held by The Bank of America as Depositary for the benefit of all parties interested in said Bond and mortgage, according as their interest may appear, it being understood and agreed between the parties hereto and by and with the persons who will from time to time be the holders of said certificates, that each certificate shall represent and be an evidence of the ownership of an undivided share or part to the extent of the principal amount therein stated, in the aggregate principal of said Bond and Mortgage and the mortgage debt secured thereby (with interest at the rate specified in said certificate) and that each holder is entitled to a like proportion, right or benefit in said guarantees of payment, policy or policies of titled insurance, insurance policies and other instruments and evidences of title relating thereto, accompanying the same, or which may at any time accompany or be collateral thereto, and held by the Depositary, each such share or part being owned by the holder thereof without priority of any share or part over [fol. 369] any other, whether held by the Corporation or Depositary, or by the holder of any other certificate to be issued hereunder, and each share or part not being subordinate to any other shares thereof and not subject to any prior interest in said bond and mortgage." Prudence was not a party to this agreement and the words "the Corporation" refer to Prudence-Bonds Corporation.

The certificates acknowledge payment for an undivided share or part in the bond and mortgage of Burnside Improvement Co., Inc., equal to the amount paid. The certificate provides:

"The share or part in said bond, mortgage and extension agreement represented by this agreement, is not and shall not be subordinate to any other share or shares thereof,

and is not and shall not be subject to any prior interest therein."

The Corporation and Prudence, the guarantor, are irrevocably authorized to collect moneys payable under the terms of the mortgage; to credit the bond, mortgage and extension agreement with payments thereon; to satisfy or assign said mortgage upon payment thereof; to "account to the holder of this certificate for his share of the principal and for interest at the rate of five and one-half per cent per annum thereon, payable under the terms of this certificate and to retain any balance of moneys collected * * *." The certificate also contains the following:

"The Corporation, the Guarantor and The Bank of America, New York, for their respective corporate accounts, may be the holder or pledgee of similar share in said bond and mortgage as extended."

[fol. 370] On the reverse side of the certificate Prudence certifies its guaranty and further certifies and guarantees "that the share or part of said bond, mortgage and extension agreement represented by the foregoing certificate is not subordinate to any other share or shares thereof, and is not subject to any prior interest therein." The Bank of America also certifies on the back of the certificate "that the share or part of said bond and mortgage, as extended, represented by the foregoing certificate, is not and shall not be subordinate to any other share or shares thereof, and is not and shall not be subject to any prior interest therein."

We are concerned only with the claim for parity on account of certificates acquired by Prudence after default by the mortgagor. Most of the acquisitions were either by exchange of outstanding certificates for other similar investments or in part for such investments and in part for cash. Certain certificates were purchased through a brokerage account at prices substantially below par and interest. As a result of all of these transactions, Prudence acquired certificates in the face amount of $425,212.86 at a cost to it of $418,372.66, or about one and six-tenths per cent below par on all of the certificates acquired. Although these certificates aggregating $425,212.86 face value were all required by Prudence prior to March 1, 1933—and some as early as March 3, 1932—they were on March 1, 1933, canceled

and a new certificate for the entire amount was issued in the name of Reconstruction Finance Corporation. A month later, on April 4, 1933, this certificate was in turn canceled and a new certificate for the same amount was issued in the name of Prudence.

[fol. 371] The decisions of this court cited (*supra*) control decision here. In *Matter of Title & Mortgage Guaranty Co.* (275 N. Y. 347) the Title Company, which had issued and sold mortgage participation certificates and had guaranteed to purchasers payment of principal and interest due thereon, retained an unsold interest in the mortgage of $200. In proceedings for the rehabilitation of the Title Company, the Superintendent of Insurance as liquidator claimed, upon the judicial settlement of the accounts of the trustees, and it was entitled as holder of the $200 interest to share in the distribution of the amount collected upon the bond and mortgage *pro rata* with the holders of the guaranteed certificates. It was held that the holders of the guaranteed certificates had a prior right to payment out of the proceeds of the mortgage. In the opinion *Title Guarantee & Trust Co. v. Mortgage Commission* (273 N. Y. 415) was discussed and it was pointed out that in that case the certificates were not guaranteed by the assignor nor was there any language in the certificate indicating that the interest retained by the assignor should be subordinated in any manner to the interests assigned by holders of certificates. The opinion continued (at p. 352): "In earlier cases, to which the court referred with approval in its opinion in *Title Guarantee & Trust Co. v. Mortgage Commission* (*supra*), we held that, in the absence of contractual provisions to the contrary, a corporation which has issued and *guaranteed* participation certificates in a bond and mortgage is not entitled, as owner of a retained portion of the bond and mortgage, for which no certificate had been issued, to share in insufficient pro-[fol. 372] ceeds of securities, *pro rata* with the holders of certificates which had been issued. (*Matter of Lawyers Mortgage Co.* (*545 West End Ave.*), 157 Misc Rep. 813; affd., 248 App. Div. 715; affd., 272 N. Y. 534; *Matter of New York Title & Mortgage Co.*, 272 N. Y. 556)." Reaffirming these decisions, the court found them to be supported by the weight of authority in this and other jurisdictions, citing decisions from other states to the same effect, and continued: "In other cases where the courts have reached the conclusion that an assignor of part of a debt may share

in insufficient proceeds of the debt even though the assignor had guaranteed payment of the part assigned, the courts usually found such intention either expressed in the assignment or implied by silence in circumstances which create special equities in favor of the guarantor." Consideration was given to the question of insolvency of the guarantor in its relation to the theory of circuity of action, and conclusion was reached that, where the actual intent of the parties was that an assignee should have priority over an assignor who was also a guarantor, insolvency of the guarantor cannot deprive the assignee of his right to such priority, because, as the court said, enforcement of contractual rights granted by the guarantor would in such case not give rise to an inequitable preference over other creditors of the guarantor. The court continued: "That is true in this case. The right of certificate holder to preference in the distribution of the proceeds rests not only upon presumption of intent derived from the guaranty of the assignor, but also upon actual intent clearly implied in the clause of the certificate which provides that upon the collection of [fol. 373] the proceeds of the mortgage by the assignor it shall have the right 'out of the proceeds of such collection to retain so much as may remain *after* paying to the holder hereof whatever may be due to such holder of principal and interest on this certificate as herein provided.'" A similar clause was considered in *Matter of People (Union Guar. & Mtg. Co.)*, (285 N. Y. 337). The language in the certificate was that the Guaranty Company "* * * shall likewise have the right to retain, out of the proceeds of collection of said bond and mortgage, so much as may remain after paying whatever may be due to the assured of principal and interest on this or other certificates." Of this provision it was said in the opinion: "It is clear from the language used in the above-quoted portion of the certificates that such portion is sufficient evidence of an actual intent on the part of the contracting parties to grant priority to the certificate holders." So far as that part of the opinion is concerned, it was unanimous.

In this case there is a similar provision in the certificate, quoted (*supra*). While there are verbal differences in these three clauses, they are all of the same effect and expressly provide that the guarantor, having collected the proceeds of the mortgage, shall pay these certificates and retain the surplus. Here, as in the other cases, there are other clauses which, standing alone, might be taken to indicate parity of

treatment as between the guarantor and the other certificate holders. This was true in *Matter of Title & Mortgage Guaranty Co.* (*supra*) and in *Matter of People* (*Union Guar. & Mtg. Co., supra*). When there is ambiguity in the agreement relied upon by the guarantor in support of a claim of parity, [fol. 374] the rule denying parity to the guarantor is enforced. (*Pink* v. *Thomas*, 282 N. Y. 10, 12.) In the latest decision of this court (*Matter of Lawyers Title & Guaranty Co.*, 287 N. Y. 264) it was held that a certificate owned by the guarantor and pledged as collateral for a loan was subordinate to the interest of the owner of a certificate purchased by the holder.

Under the settled course of decisions in this State the guaranteed mortgage participation certificates held by the defendant, Prudence Realization Corporation, are not entitled to parity of payment in the distribution of moneys received or assets held for the payment of the mortgage indebtedness but are subordinate to the claims of other certificate holders in the same issue.

The judgment of the Appellate Division should accordingly be reversed, with directions to enter judgment declaring that the certificates held by the defendant, Prudence Realization Corporation, are subordinate to those held by others, and directing the defendant, Prudence Realization Corporation, to turn over to Joseph W. Ferris, George L. Long and Henry Leifert, as trustees under the declaration of trust dated as of July 1, 1938, with respect to 307 West 36th Street (Burnside) first mortgage participation certificates, all moneys held by it on account of any of the Burnside participation certificates, with costs in this court and in the Appellate Division to the plaintiffs and defendants-appellants in Action No. 1.

The judgment of the Appellate Division should be reversed and judgment directed in accordance with this opinion, with costs in this court and in the Appellate Division [fols. 375-376] to the plaintiffs-appellants and defendants-appellants in Action No. 1.

Lehman, Ch. J., Loughran, Rippey, Lewis, Conway and Desmond, JJ. concur.

Judgment accordingly.

* * * * * * *

Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 377] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 9, 1944

The petition herein for a writ of certiorari to the Supreme Court of the State of New York is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 378] Endorsed on Cover: File No. 48,583 New York. Supreme Court, Term No. 137. Prudence Realization Corporation, Petitioner, vs. Joseph W. Ferris, George L. Long and Henry Leifert, as Trustees under a Declaration of Trust dated as of July 1st, 1938, with respect to 307 West 36th Street (Barnside) First Mortgage Participation Certificates, et al. Petition for a writ of certiorari and exhibit thereto. Filed June 7, 1944. Term No. 137 O. T. 1944.

Supreme Court of the United States

OCTOBER TERM 1941

No. [redacted] 137

PRUDENCE REALIZATION CORPORATION,

Petitioner,

vs.

JOSEPH W. FERRIS, GEORGE L. LONG and HENRY LEIFERT as Trustees under a Declaration of Trust dated as of July 1st, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, CITY BANK FARMERS TRUST COMPANY and MARTIN S. LINDGROVE as Trustees under the Last Will and Testament of Herman Stutzer, deceased, on behalf of themselves and other holders of certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, SOLOMON ZAUDERER, MILTON KIMMELMAN, IRVING ZAUDERER and CHARLES KIMMELMAN, doing business as KIMMELMAN AND ZAUDERER, on behalf of themselves and all other holders of Prudence Bonds Corporation participating certificate issue, and HUNTER L. DELATOUR, RAYMOND REISLER and JEROME THRALLS, Trustees of Realty Associates Securities Corporation, Debtor, holders of Burnside Certificates.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

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Petitioner.

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Supreme Court of the United States

OCTOBER TERM 1944

No.

PRUDENCE REALIZATION CORPORATION,
Petitioner,

vs.

JOSEPH W. FERRIS, GEORGE L. LONG and HENRY LEIFERT as Trustees under a Declaration of Trust dated as of July 1st, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, CITY BANK FARMERS TRUST COMPANY and MARTIN S. LINDGROVE as Trustees under the Last Will and Testament of Herman Stutzer, deceased, on behalf of themselves and other holders of certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, SOLOMON ZAUDERER, MILTON KIMMELMAN, IRVING ZAUDERER and CHARLES KIMMELMAN, doing business as KIMMELMAN AND ZAUDERER, on behalf of themselves and all other holders of Prudence Bonds Corporation participating certificate issue, and HUNTER L. DELATOUR, RAYMOND REISLER and JEROME THRALLS, Trustees of Realty Associates Securities Corporation, Debtor, holders of Burnside Certificates.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

To the Honorable the Chief Justice of the Supreme Court of the United States of America and the Honorable Associate Justices thereof:

Your petitioner, Prudence Realization Corporation, respectfully submits this, its petition for a writ of certiorari

to review the judgment and order of the Court of Appeals of the State of New York and the judgment entered thereon in the office of the Clerk of the Supreme Court of the State of New York, County of New York, determining that certificates of participation held by Prudence Realization Corporation (hereinafter sometimes described as the creditors' corporation) in a mortgage participation certificate issue covering premises at 307 West 36th Street, New York City, New York, also known as the Burnside Certificate Issue, are subordinated in time of payment of principal and interest to similar certificates of participation held by other certificate holders.

Opinions Below

Written opinions have been rendered by the Additional Special Term Justice (R. 322, not reported), by the Appellate Division, First Department of the Supreme Court of the State of New York, County of New York (R. 340, reported at 266 App. Div. 543), and by the New York Court of Appeals (R. 359, reported at 292 N. Y. 210).

Jurisdiction

The judgment and order of the New York Court of Appeals was entered on March 10, 1944 (R. 345), and the judgment of the Supreme Court, New York County, was entered thereon on April 20, 1944 (R. 351). The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended (28 U. S. C. A., Sec. 344(b)).

Questions Presented

The New York Court of Appeals held its own decisions controlling on the question of creditor participation in an

solvent estate which had been reorganized under Section B of the Bankruptcy Act. The property reorganized was al estate and a mortgage thereon, against which partici- tion certificates had been issued. The 77-B Trustees of e insolvent guarantor held some of the certificates. olely to avoid delay in consummating the 77-B Plan for e Certificate Issue, it was amended so as to provide that distribution should be made thereunder upon such cer- ficates until an adjudication was had by a "court of com- tent jurisdiction" of the rights to participation with spect to such certificates. The plan as so amended as confirmed and the reorganization proceeding closed. hereafter, an action was instituted in the New York tate courts wherein the plaintiffs prayed for adjudication f the rights of participation to which the certificates held y the insolvent guarantor were entitled. Petitioner is the reditors' corporation organized pursuant to the plan of eorganization of the bankrupt guarantor and succeeded its rights. Named as a defendant, it demanded judgment ecreeing that it was entitled to parity of treatment with ther certificate holders on the ground that since the Cer- ificate Issue and the Guarantor had been reorganized under Section 77B of the Bankruptcy Act and the question of articipation on account of its certificates had been re- erved in the manner and circumstances above described, uch question was determinable in accordance with federal aw and that under applicable federal decisions its certifi- ates were entitled to parity of treatment with those held by thers. The Appellate Division of the New York Supreme Court unanimously upheld petitioner's view and ordered judgment in its favor on the authority of *Prudence Realiza- tion Corporation* v. *Geist*, 316 U. S. 89 (R. 343). The Court of Appeals reversed, holding that the question of partiy was one of state law and that under local law petitioner's certificates are subordinate to other certificates (R. 359). The principal questions involved are:

1. Did the state court litigation necessarily involve adjudication of substantial title, rights, privileges or immunities specially set up or claimed by petitioner under the Constitution or statutes of the United States?

2. In construing the provisions of a Plan adopted in a reorganization proceeding under Section 77B of the Bankruptcy Act, was the state court correct in failing to give effect to the provisions of the Bankruptcy Act and the decisions of this court thereunder?

3. Was the state court correct in disregarding the effect of bankruptcy reorganization proceedings for the certificate issue and the guarantor and in applying local law alone in determining the rights of the guarantor's creditors to participate in the proceeds of the certificate issue?

4. Was the state court correct in construing a provision in a federal plan of reorganization not alone as a grant of concurrent jurisdiction to a state court, but as a surrender of creditors' rights under the Bankruptcy Act as well?

Statement

The Prudence Company, Inc., hereafter called "Prudence", was organized under the Banking Law of the State of New York in 1919. It was engaged in the business of making loans secured by mortgages on real estate. The bonds and mortgages received for such loans were assigned to an affiliated corporation, Prudence-Bonds Corporation. In many instances, Prudence-Bonds Corporation transferred these bonds and mortgages to corporate trust companies called depositaries and issued certificates of participation in such mortgages to Prudence which in turn sold them to the general public together with its guaranty of payment of principal and interest. The guaranty of Prudence called for the payment of interest on the certificates

when due and for the payment of principal within eighteen months after maturity (R. 53).

These mortgage participation certificates constituted the holders thereof tenants in common of the underlying mortgage and bond secured thereby (*In re Westover* [C. C. A. 2d], 82 F. [2d] 177).

As part of its business, from time to time Prudence either repurchased some of these certificates from the investing public or received them in exchange for certificates in other mortgages.

Prudence Realization Corporation, the petitioner here, was organized pursuant to a plan of reorganization for Prudence under Section 77B of the Bankruptcy Act (R. 24). The plan was proposed by Reconstruction Finance Corporation, the largest single creditor of Prudence, after a finding had been made that Prudence was insolvent. The plan provides that the stockholders of Prudence have no interest in the liquidation of its assets and provides for the distribution of the proceeds of such liquidation to creditors only (R. 25). Petitioner is therefore a creditors' realization corporation and in no way represents interests of the old stockholders.

The Burnside Certificate Issue was created in the general manner above described. The mortgage originally in the principal sum of $1,200,000 was reduced by payment to $1,016,000. The certificates to the extent of $1,016,000 are presently outstanding (R. 20). Included in the assets of the insolvent Prudence estate transferred to petitioner are $431,212.86 in principal amount of Burnside certificates which were repurchased in the regular course of its business by Prudence during 1932 and 1933 (R. 23, 59). These certificates were included in the corporate assets of Prudence as evidenced by published financial statements and corporate balance sheets prepared by certified public accountants (R. 206).

In January, 1935 an involuntary petition for the reorganization of Prudence under Section 77B of the Bank-

ruptcy Act was filed in the Eastern District Court and on February 1, 1935 the petition, consolidated with the debtor's voluntary petition for reorganization, was approved and trustees appointed. An order was entered in that proceeding prescribing the procedure for the filing of proofs of claim by creditors including certificate holders of the Burnside Certificate Issue who were unsecured creditors of the debtor. In these proofs of claim certificate holders asserted unsecured claims for the full principal and interest due on the Prudence guaranty of the certificates held by them (R. 193, 201) and they were allowed as such.

On March 16, 1936, pursuant to authorization secured in the Prudence proceeding, the petition for reorganization of Amalgamated Properties, Inc., a subsidiary of Prudence, was approved by the Eastern District Court (R. 21). Included among its assets was the real property subject to the Burnside Certificate Issue mortgage, and in that proceeding a plan of reorganization for that issue was proposed which provided for the transfer of the real property by Amalgamated to three trustees appointed for certificate holders who also, pursuant to said plan, acquired the certificated mortgage. The lien of the mortgage was preserved for the benefit of all the certificate holders who also become co-owners of the real estate. That plan of reorganization for the Burnside Issue, as amended, was finally approved by the District Court on June 14, 1938 (R. 22) and the property together with the outstanding mortgage was transferred to Joseph W. Ferris, George L. Long and Henry Leifert, trustees, respondents herein (R. 250).

The plan of reorganization for the Burnside Issue did not distinguish between rights of the Prudence trustees and other holders of certificates to participate in the proceeds of the trust estate. A question, however, arose as to the right of the Prudence trustees to share on a parity with other holders of certificates, in view of the fact that Prudence had guaranteed the payment of principal and

interest of the certificate issue. In order to avoid delay in the consummation of the plan, the plan was amended by agreement so as to provide that no distributions should be made thereunder on the Prudence-held certificates until the rights of such certificates were adjudicated by "a court of competent jurisdiction". This amendment to the plan was approved by the judge in charge of the proceeding in his order confirming the plan (R. 175). The order approving the amendments and confirming the plan did not separately classify the Prudence trustees (R. 163, 164).

The plan of reorganization for Prudence was confirmed by the District Judge in charge of that proceeding and of the proceeding for the reorganization of the Burnside Certificate Issue on May 26, 1939, ten months after the Burnside plan had been approved (R. 126). In accordance with its provisions, all of the assets of Prudence and its trustees were transferred and assigned to petitioner, the creditors' realization corporation, by assignment dated June 1, 1939. As is set forth in the order confirming the Prudence plan, there were outstanding obligations of Prudence aggregating $133,713,000 (R. 66). Of these claims only the claim of the United States of America for $400,000 has been fully paid.

Prior to the institution of the proceeding for the reorganization of Prudence and in June, 1932, all of the stock of its wholly owned subsidiary, Amalgamated Properties, Inc., had been deposited as part of the collateral for a loan made by Reconstruction Finance Corporation to Prudence. In 1938, in accordance with the decision of the Circuit Court of Appeals for the Second Circuit (*In re The Prudence Company, Inc.*, 90 F. (2d) 587), the ownership of that subsidiary of Prudence passed from the bankrupt estate to Reconstruction Finance Corporation. During 1940, as a result of negotiations between Reconstruction Finance Corporation and petitioner, a claim of petitioner against Amalgamated was assigned to a subsidiary of Reconstruction Finance Corporation in exchange for cer-

tain assets of Amalgamated. Upon the consummation of this compromise Reconstruction Finance Corporation's subsidiary became the sole creditor and stockholder of Amalgamated and sought the dismissal of the reorganization proceedings relating to Amalgamated since no reorganization was necessary. In order to accomplish such a dismissal it was necessary to close the proceedings for the reorganization of the several certificate issues which had been reorganized in the Amalgamated proceeding, including the Burnside Certificate Issue. For that reason, and that alone, an order was entered closing the Burnside Certificate Issue reorganization proceeding (R. 193-195).

In May, 1940, the trustee appointed as a result of a plan of reorganization for the Zo-Gale Certificate Issue, which also had been reorganized in the Amalgamated proceeding, started a proceeding in the federal court in the Amalgamated proceeding to determine the parity question which had been reserved in the Zo-Gale plan for adjudication by "a court of competent jurisdiction". That application had not yet been determined by the District Court. Under these circumstances the order dismissing the Amalgamated proceeding specifically reserved jurisdiction in the federal court with respect to the pending motion for the determination of the parity question in the Zo-Gale Issue (R. 195, 196).

The District Court's opinion in the *Zo-Gale* case was rendered on January 25, 1941, holding that the Prudence-held certificates were subordinated. The court there held that the law of the State of New York was controlling on the issue and that under such decision other holders of certificates were entitled to priority in the distribution of the proceeds of the Zo-Gale estate.

In August, 1941, the United States Circuit Court of Appeals for the Second Circuit affirmed by a divided court the decision of the District Judge in the *Zo-Gale* case (*Geist* v. *Prudence Realization Corporation*, 122 F. (2d) 503). This Court on January 5, 1942 granted a petition

for a writ of certiorari to the United States Circuit Court of Appeals in the *Zo-Gale* case, and on April 28, 1942 rendered its decision unanimously reversing the decision of the Circuit Court of Appeals in the *Zo-Gale* case, and held that the question of parity was one of federal law and that under the Bankruptcy Act petitioner, as representative of the creditors of the insolvent guarantor, was entitled to a position of parity with all other certificate holders (*Prudence Realization Corporation* v. *Geist*, 316 U. S. 89).

Immediately after the District Court decision was rendered in the *Zo-Gale* case, and on February 25 and 26, 1941, complaints were served upon petitioner by the trustees-respondents and by holders of Burnside certificates suing in a representative capacity, in actions for declaratory judgments instituted in the Supreme Court of the State of New York, County of New York, by which actions the plaintiffs sought to secure a determination that the certificates held by petitioner in the Burnside Certificate Issue were subordinated to certificates held by others. Answers were filed by other certificate holders seeking equivalent relief by cross-complaint against petitioner. Answers were interposed by petitioner which denied that the certificates held by it were to be subordinated and, further, urged as affirmative defenses that in view of the reorganization of the certificate issue and the guarantor in the federal court under the provisions of the Bankruptcy Act, the question of participation in the distributions of the proceeds of the Burnside Certificate Issue was a question of federal law as to which the provisions of the Bankruptcy Act and the federal decisions thereunder were controlling (R. 258-263). The actions were thereafter consolidated.

After this Court's decision in the *Geist* case, petitioner moved in the Additional Special Term of the Supreme Court of New York County for summary judgment (R. 11).

No issues of fact were presented and all parties agreed that the matter could be disposed of as a matter of law, the primary question being whether this Court's decision in *Prudence Realization Corporation* v. *Geist, supra,* was controlling or whether the decisions of the State of New York were binding (R. 322). As part of the record a deposition was taken of a witness called by respondents (R. 207, 321). The Justice at Additional Special Term denied the motion for summary judgment. Appeals were taken from the order entered upon that decision by all the interested parties and the Appellate Division of the Supreme Court of the State of New York, First Department, unanimously reversed the Special Term and held that where the certificate issue and the guarantor are reorganized in the federal court, the question of participation in the assets of the insolvent certificate issue is one of federal law and that under the decision of this Court in *Prudence Realization Corporation* v. *Geist, supra,* the certificates held by petitioner are entitled to parity with all other certificate holders (*Ferris, et al.* v. *Prudence Realization Corporation*, 266 App. Div. 343 [R. 343]).

Appeals were taken from the judgment entered upon that decision by the trustees-respondents and by City Bank Farmers Trust Company and Martin S. Lindgrove, etc., certificate holders. The New York Court of Appeals reversed the Appellate Division. It determined that the question of parity is a matter for the state court and determinable exclusively as a matter of local law. Upon that basis the New York Court of Appeals purported to distinguish this Court's opinion in *Prudence Realization Corporation* v. *Geist*, omitting, however, reference to the fact that the question of parity in that case similarly had been reserved for adjudication by "a court of competent jurisdiction" (R. 359).

Specification of Errors

The New York Court of Appeals erred

1. in holding that the certificates of participation in the Burnside Certificate Issue owned by Prudence Realization Corporation are not entitled to parity of distribution with certificates held by others but are subordinate to such certificates;

2. in holding that the question of parity was determinable as a matter of New York law;

3. in failing to hold that since the Burnside Certificate Issue and The Prudence Company, Inc., the guarantor, were reorganized in the federal court under Section 77B of the Bankruptcy Act, the question of parity was determinable as a matter of federal law;

4. in failing to hold that, in accordance with the provisions of the Bankruptcy Act and the decision of this Court in *Prudence Realization Corporation* v. *Geist*, 316 U. S. 89, Prudence Realization Corporation is entitled to share equally with other certificate holders in the proceeds of the Burnside Certificate Issue;

5. in holding that the plan of reorganization for the Burnside Certificate Issue contained no provision with reference to Burnside Certificate Issue certificates held by petitioner.

Reasons Relied On for the Allowance of the Writ

1. The decision of the New York Court of Appeals is in conflict with the decision of this Court in *Prudence Realization Corporation* v. *Geist*, 316 U. S. 89, and *Local Loan Co.* v. *Hunt*, 292 U. S. 234. In determining the right

to participation with respect to certificates held by petitioner, the state court has disregarded the effect of bankruptcy reorganization proceedings for the certificate issue and the insolvent guarantor. It has held that the participating rights of the insolvent guarantor's creditors in the proceeds of a certificate issue is a matter of local rather than federal law even though the guarantor and the certificate issue have been reorganized in the federal court under Section 77B of the Bankruptcy Act.

In the *Geist* case this Court held that federal and not local law was applicable to a determination of similar rights to those asserted by petitioner here. Petitioner in the *Geist* case and in the present one is the same corporation, asserting the same rights. The respondent in the *Geist* case was a certificate issue trustee holding a position identical with that of the trustee-respondents. In the *Geist* case the question of parity had been reserved similarly for adjudication by a "court of competent jurisdiction". The pertinent provisions of each plan are substantially identical:

PRUDENCE REALIZATION CORPORATION V. GEIST, SUPRA
Case on Appeal (R. 6)

"Some question has arisen with respect to the rights of The Prudence Company, Inc. on account of $816.67 of Certificates held or claimed by that Company and its Trustees, and question has also arisen with respect to the interest in said Mortgage (being the $7,200 principal amount thereof not represented by outstanding Certificates) owned or claimed by The Prudence Company, Inc. and its Trustees and/or by Prudence-Bonds Corporation and its Trustees."

FERRIS V. PRUDENCE REALIZATION CORPORATION
(R. 362, 363)

"A question has arisen with respect to the rights of The Prudence Company, Inc., or its Trustees on account of the certificates held or claimed by them, including so-called 'unissued certificates.'

UDENCE REALIZATION CORPORATION V. GEIST, SUPRA
Case on Appeal (R. 6)

nything in the Amended Plan the contrary notwithstanding, Trustee under the Amended n shall make no distributions cash and/or securities on ac- nt of the Certificates now d or claimed by The Prudence mpany, Inc. and its Trustees, on account of the part of said rtgage which is not repre- ted by outstanding Certifi- es, *unless and until it shall e been finally adjudicated by ourt of competent jurisdiction* t The Prudence Company, Inc. l its Trustees and/or Pru- ce-Bonds Corporation and its ustees are entitled to share in trust estate by reason there- (Italics supplied.)

FERRIS V. PRUDENCE REALIZATION CORPORATION
(R. 363)

"Anything in the Plan to the contrary notwithstanding, the Trustees to be appointed hereunder shall make no distributions of cash or other property or securities which would be otherwise distributable on account of the certificates now held or claimed by The Prudence Company, Inc., or its Trustees, including said 'unissued certificates,' *unless and until it shall have been finally adjudicated by a Court of competent jurisdiction* whether or not The Prudence Company, Inc. or its Trustees, or their successors or assigns, are entitled to receive such cash or other property or securities and to share in the proceeds of the property to be assigned to the Trustee pursuant to the Plan and on a parity with other certificate holders or otherwise." (Italics supplied.)

In each case the litigation was instituted some time after consummation of the certificate issue plan. The sole dissimilar feature is that in the *Geist* case the trustees appointed under the plan instituted the proceedings in the federal court before the closing of the certificate issue reorganization proceeding, and in the present case the trustees instituted the proceedings in the state court after the closing of the federal proceeding.

It is apparent that the intent of the parties and of the reorganization court in each of these cases was the same; that there was no intent in either case to waive any right to adjudication of the question as a matter of federal law; that the phrase "court of competent jurisdiction"

meant no more than that phrase can mean at any time—any court having jurisdiction of the parties and of the subject matter.

As a basis for rejecting the decision of this Court in the *Geist* case, the state court relied on the fact that in the Burnside plan the question of parity had been reserved for adjudication "by a court of competent jurisdiction", and said at page 218 (R. 366):

> "Upon this record it appears without contradiction that the Burnside plan of reorganization did not attempt to define or determine the relative rights of Realization Corporation as the holder of certificates acquired by Prudence and of other holders of Burnside certificates, nor was any determination of these rights made in the Bankruptcy Court in the course of its administration or in connection with the distribution of any of the assets either of Prudence or of Amalgamated. The controversy, therefore, was brought to the state courts, as contemplated by the plan of reorganization, for determination of these relative rights unaffected by the reorganization in the Federal court."

But, as has been indicated, in the *Geist* case the question of parity similarly was reserved for adjudication "by a court of competent jurisdiction" and the adjudication there resulted from an application made pursuant to that reservation. The state court placed great stress upon the fact that in the *Geist* case the question was determined in the reorganization proceeding. It disregarded the fact that the parity question could have been determined similarly in the Burnside reorganization proceeding pursuant to the same reservation.

In the *Geist* case, the question was not determined by the plan nor by any administrative order. The proceeding for its determination was instituted by the trustee appointed under the plan after the plan's consummation. At the time of the institution of the proceeding the property was being administered by such trustee outside the

bankruptcy court. Since the question had been reserved as part of the plan's confirmation, this Court considered the question as it existed at the time of reservation—a matter of distribution of the proceeds of a certificate issue which had been reorganized in the federal court, among certificate holders including representatives of creditors of an insolvent guarantor being reorganized for its creditors' benefit in the federal court. The status of the parties in the present case at the time of the reservation was the same as it was in the *Geist* case, and the subsequent closing of the Amalgamated proceeding did not alter that status nor relieve the state court from its obligation to determine the issue as a federal question.

The New York Court of Appeals, however, has interpreted the reservation as a waiver of the right to secure an adjudication of the question as a federal question and, further, as authority for the state court to disregard the federal reorganization of the certificate issue, the bankruptcy of the guarantor and the rights of the insolvent guarantor's creditors under the Bankruptcy Act.

The fact that the reservation gives to any court having jurisdiction of the parties the right to determine the parity question does not negative the requirement that such court apply federal law in determining a federal question (*Lucotin* v. *Atlas Exchange Bank*, 295 U. S. 209). Nor may the rights secured to the Prudence creditors by the Bankruptcy Act be abrogated by the state court merely because the litigation proceeds in that court through the choice of the plaintiffs.

This Court has protected by injunction a discharged bankrupt from the resultant hardship of an unwarranted judgment which would violate the purpose and spirit of the Bankruptcy Act.

In *Local Loan Co.* v. *Hunt*, 292 U. S. 234, an assignee of future wages instituted suit in the Illinois state court against the employer of a debtor who had received a discharge in bankruptcy. The bankrupt sought an injunc-

tion in the federal court restraining the judgment-creditor from proceeding with his state court action on the ground that by its prior decisions the Illinois court had demonstrated that it would refuse to give effect to the discharge in bankruptcy and would permit the action to proceed to judgment.

In considering the competency of the state court's jurisdiction this Court said at p. 241:

> "So far as appears, the municipal court was competent to deal with the case. * * * And it may be conceded that the municipal court was authorized in the law action to afford relief the equivalent of that which respondent now seeks in equity."

In sustaining the injunction, however, this Court held that a state court would not be permitted to enter a judgment which would violate the purpose or spirit of the Bankruptcy Act. After pointing out that one of the purposes of the Bankruptcy Act was to give to an honest but an unfortunate debtor a new opportunity unhampered by the pressure and discouragement of pre-existing debt, this Court said at p. 245:

> "The various provisions of the Bankruptcy Act were adopted in the light of that view and are to be construed when reasonably possible in harmony with it so as to effectuate the general purpose and policy of the act. Local rules subversive of that result cannot be accepted as controlling the action of a federal court."

The present case comes squarely within the decision of this Court in the *Local Loan Company* case. The Bankruptcy Act, Section 65(a), requires that in liquidations, distribution of dividends of an equal percentum shall be made in all allowed claims except such as have priority or are secured (*Prudence Realization Corporation* v. *Geist*, *supra*; *Globe Bank* v. *Martin*, 236 U. S. 288, 305; *Moore* v. *Bay*, 284 U. S. 4). This purpose of the Bankruptcy Act,

avoid preferences, is the object similarly of protection the federal court. Here the state court has refused to ve effect to these express provisions of the Bankruptcy t and the decisions of this Court interpreting such pro-sions in construing a federal plan of reorganization, and is submitted is similarly subject to reversal by this urt as violative of the purpose of the Bankruptcy Act.

2. The result of the present decision is to grant a prefer-ce to Burnside certificate holders unauthorized by the nkruptcy Act and in conflict with the decisions of this urt.

In *Prudence Realization Corporation* v. *Geist*, at p. 97, s Court said:

> "The Prudence Company, Inc. is not solvent. Its property is being liquidated in bankruptcy where all the claimants on its present and other guaranty obligations are entitled to share equally in its unpledged assets. Denial of the right to prove its claim, which is an asset in which all of Prudence's creditors are otherwise entitled to share, will serve only to divert this asset from all creditors to one class of creditors, the Zo-Gale certificate holders, and thus give to them the exclusive benefit of a security for which they have not bargained."

The New York Court of Appeals, by holding petitioner's ificates subordinate, has effectively accomplished what Court held to be improper, for the Burnside certificate lers thus far have been granted the exclusive benefit the Burnside mortgage at the expense of all other dence creditors including the Zo-Gale certificate holders, se claim for a similar preference was denied by this rt in the *Geist* case:

> The New York Court of Appeals has decided a fed-question of substantial importance in a manner which result in confusion in the administration of federal

laws in the federal and state courts. The state court has held that the identical question which this Court held to be a question of federal law in the *Geist* case becomes a question of local law merely because the proceeding was instituted in the state court subsequent to the closing of the reorganization proceeding. In the *Geist* case, however, the parity question was held to be a matter of federal law because the participation of creditors was regulated by the Bankruptcy Act. The institution of the reorganization proceedings crystallized the rights of creditors. Wherever those rights finally are adjudicated, that adjudication necessarily must be had on the basis of the laws by which those rights were affected and regulated. Thus it should make no difference whether the adjudication is had in the federal or state courts. If the question as held in the *Geist* case was a federal question, it continues to be a federal question even though the litigation for its adjudication takes place in the state court.

It must be conceded that had the litigation of the Burnside parity question been instituted in the federal court after the consummation of the federal plan, as was true in the *Geist* case, the federal rule would be applicable. It is solely because respondents elected to sue in the New York court that such tribunal has had the opportunity to make an adjudication and has accepted such opportunity and applied its local rule admittedly inconsistent with the federal law.*

The determination by the New York Court of Appeals here has been interpreted as indicating that the New York courts may disregard federal decisions where inconsistent with their own.

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* As illustrative of the effect sought to be given to the New York Court of Appeals decision in the present case, that decision has been cited in a federal reorganization proceeding, in which petitioner is interested as a party, as authority for the proposition that the determination of the status of petitioner's certificates is a question of state rather than federal law. *(In the Matter of 1934 Realty Corp., Debtor*, Chap. X proceedings No. 72805, U. S. D. C., S. D. N. Y.)

Hon. Orrin G. Judd, Solicitor-General of the State of New York, in reviewing outstanding decisions of the New York Court of Appeals for the past twelve months, said:

> "Another application of this principle of undivided loyalty may be found in a case like Ferris v. Prudence Realization Corporation, decided last month (Law Journal, April 7, 1944), in which the court adhered to its rule that a guarantor which reacquires mortgage certificates after default is subordinated to the claims of other certificate holders, even though the question arose under the Prudence Company reorganization plan, where the United States Supreme Court had previously decided that as far as the rights in the federal reorganization court were concerned the guarantor was on an equal status with other certificate holders (Prudence Realization Corp'n v. Geist, 316 U. S. 89). So it seems that in spite of Thompson (*sic*) v. Erie Railroad (304 U. S. 64), there are still situations where the state and federal courts will reach different results on the same state of facts" (New York Law Journal, May 18, 1944, p. 1926).

As further indication of the interpretation which will be given to the decision of the New York Court of Appeals, reference is made to a note in the United States Law Week, where, in referring to the decision of the New York Court of Appeals, the following statement appears:

> "'Prudence v. Geist' Rule Delimited.
>
> * * * * * *
>
> "The principle of the Geist case, the court declares, applies only if a federal bankruptcy court either approves a reorganization plan containing a provision determining the interests of holders and guarantor of the mortgage participation certificates or issues an order regulating their interests" (U. S. Law Week, April 4, 1944, 12 L. W. 1152).

The uncertainty of the effect of the decision is apparent and unless clarified by this Court will result in continued litigation in federal and state courts, presumably on a competitive basis. The present confusion exists despite

this Court's affirmation of the *Geist* decision in *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176 (cited as controlling by the Appellate Division in the instant case [R. 343]), and *Wragg* v. *Federal Land Bank of New Orleans*, 317 U. S. 325, 328, which were cited to the New York Court of Appeals in the instant case and ignored by that court.

If the forum of litigation is conclusive on the question as to whether federal or state law is applicable, it is submitted that future litigants should be so informed by this Court. If, however, rights granted by federal statute will be assured protection regardless of the forum in which their adjudication is sought, it is respectfully submitted that a present statement of such assurance is necessary to obviate the confusion created by the New York Court of Appeals.

Conclusion

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to the Supreme Court of the State of New York, County of New York, should be granted to review the judgment and order of the New York Court of Appeals and the judgment entered thereon in the Supreme Court of the State of New York, County of New York, and the said judgments should be reversed.

IRVING L. SCHANZER,
JAMES F. DEALY,
Counsel for Prudence Realization Corporation,
Petitioner.

June, 1944.

Supreme Court of the United States

OCTOBER TERM 1944

No. 137

PRUDENCE REALIZATION CORPORATION,

Petitioner,

vs.

JOSEPH W. FERRIS, GEORGE L. LONG and HENRY LEIFERT as Trustees under a Declaration of Trust dated as of July 1st, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, CITY BANK FARMERS TRUST COMPANY and MARTIN S. LINDGROVE as Trustees under the Last Will and Testament of Herman Stutzer, deceased, on behalf of themselves and other holders of certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, SOLOMON ZAUDERER, MILTON KIMMELMAN, IRVING ZAUDERER and CHARLES KIMMELMAN, doing business as KIMMELMAN AND ZAUDERER, on behalf of themselves and all other holders of Prudence Bonds Corporation participating certificate issue, and HUNTER L. DELATOUR, RAYMOND REISLER and JEROME THRALLS, Trustees of Realty Associates Securities Corporation, Debtor, holders of Burnside Certificates.

REPLY BRIEF ON BEHALF OF PRUDENCE REALIZATION CORPORATION, PETITIONER

IRVING L. SCHANZER,
JAMES F. DEALY,
Counsel for Prudence Realization Corporation,
Petitioner.

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REPLY BRIEF ON BEHALF OF PRUDENCE REALIZATION CORPORATION, PETITIONER

I

As to the brief of respondents Ferris, Long and Leifert.

1. These respondents contend that no federal question is involved because the Court of Appeals decided that neither the plan of reorganization nor any order in the

reorganization proceeding undertook to modify the legal rights of the parties and that therefore the question should be determined unaffected by the reorganization proceedings as if there had been no insolvency or bankruptcy.

In the first place, the relative rights of petitioner and other holders were specifically modified by the plan. The plan provided that if the Prudence certificates were not entitled to parity, then the income which would have been payable on the certificates should be distributed one-half to other certificate holders and one-half to the sinking fund for the purchase of certificates. The fact is that the "court of competent jurisdiction" was required merely to interpret the provisions of the plan providing for adjudication of the question whether the Prudence certificates were or were not entitled to parity. It could not determine that question unaffected by the reorganization because the provision in the plan for the disposition of the income was on a basis wholly inconsistent with state law. Thus, it could not have been contemplated by the plan, as held by the Court of Appeals, that the controversy should go to the state court for determination unaffected by the reorganization. On the contrary, no matter what the forum was, it was necessary to interpret the rights of the parties under the plan of reorganization in bankruptcy. Such a question necessarily could not be unaffected by the reorganization proceeding.

Secondly, even if the plan itself did not specifically provide for the distribution of the fund dependent upon whether or not the Prudence certificates were entitled to parity, there would still remain the question of the effect the bankruptcy had on what otherwise would have been the rights of the parties.

The determination of the effect of bankruptcy is a matter properly within the jurisdiction of the federal court and an adjudication by a state court as to the effect of such bankruptcy therefore is necessarily a matter of federal law determinable in accordance with federal rather than state decisions. *Local Loan Co.* v. *Hunt*, 292 U. S. 234.

The argument made by these respondents as to what the result would have been had the question of parity been litigated prior to the bankruptcy of the guarantor is academic, for the fact is in the present case that the guarantor became a bankrupt and that it was reorganized exclusively for the benefit of its creditors. This argument is predicated solely upon the assumption, upon which the New York Court of Appeals also relied, that the fact of the bankruptcy is of no moment and that rights may be adjudicated by a state court without regard to the bankruptcy.

These respondents also urge that a right of priority in property of a creditor may not be lost through the mere institution of a proceeding in bankruptcy. However, it is clear, rights granted by state statute or decision may not control the operation of the federal statute such as the Bankruptcy Act and that such rights granted by state law will be recognized only to the extent that they are not inconsistent with the language or the spirit of the federal statute. *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, 176; *Wragg* v. *Federal Land Bank of New Orleans*, 317 U. S. 328; *City of New York* v. *Feiring*, 313 U. S. 283; *City of New York* v. *Hall* (C. C. A. 2d, 1944), 139 F. (2d) 935, 936.

On page 7 of respondents' brief, they concede that petitioner had the right to institute the litigation for the determination of the parity question. They draw the conclusion, however, from the failure of petitioner to institute suit in the federal court, that petitioner concedes that the matter was one for adjudication by the state court as a matter of state law. The fact is, that prior to the institution of the present action, however, petitioner was engaged as a respondent in federal court litigation involving the same question which had been similarly reserved, and in that litigation urged that the question of parity was reserved as a question of federal law, determinable in accordance with the Bankruptcy Act. *Prudence Realization Corporation* v. *Geist*, 316 U. S. 89. Moreover,

in the present litigation the answers of petitioner urge that the question is one of federal law. That position has been continuously maintained and was upheld by the unanimous decision of the Appellate Division of the State of New York. *Ferris* v. *Prudence Realization Corporation*, 266 App. Div. 543.

2. At page 8 of their brief, these respondents seek to distinguish the decision of this Court in *Prudence Realization Corporation* v. *Geist*, *supra*, upon the erroneous assumption that the application by the trustee for the determination of the parity question in that case was in the nature of a request to modify or change the plan. It is evident that since the trustee in the *Geist* case was not a reorganization trustee but the trustee appointed after the confirmation of the plan, he was not "a party in interest" authorized to propose amendments to the plan. National Bankruptcy Act, Section 77B (f), 11 U. S. C. A., § 207 (f). Nor can any familiarity with reorganization practice justify an assumption that an application for a determination that petitioner's certificates were subordinate, which application was made on notice solely to petitioner, was a proposed amendment or modification of the plan of reorganization.

Respondents also devote several pages of their brief to the argument that the Burnside plan may not be collaterally attacked. It is submitted, however, that urging that the parity question be determined as a matter of federal law is not in the nature of a collateral attack upon the plan of reorganization. Petitioner's position is that the question of parity, determination of which is required by a federal plan of reorganization, shall be determined in accordance with the federal law. The respondents, however, are urging that the question be determined not alone as a matter of state law, but in complete disregard of the federal plan of reorganization and the federal bankruptcy proceeding itself. The attack on the Burnside plan, if any there be, is not in any sense collateral, but is direct in character and is directed solely by respondent.

II

As to the brief of respondents City Bank Farmers Trust Company and Lindgrove.

Before discussing these respondents' arguments addressed to the merits of the petition, accuracy requires that several statements of fact in their brief be clarified.

1. At pages 4 and 5 of their brief, in referring to the "New Loan Value" formula adopted as part of the plan of reorganization for the guarantor, respondents assert that this formula approximated the method in the New York state court reorganizations.

However, the precise question was presented to the New York Court of Appeals, which held in *Matter of New York Title and Mortgage Co.*, 277 N. Y. 66, that such a formula was improper under New York law and prohibited its use in state court reorganizations.

2. At page 12 of their brief, in discussing the reservation in the *Zo-Gale* reorganization, which was the subject of litigation in this Court in *Prudence Realization Corporation* v. *Geist*, *supra*, respondents state that in that case, "the only reservation was contained in the order confirming the Plan, when the Court, in closing the *Zo-Gale* proceeding, reserved jurisdiction to try the bankruptcy issue then pending undecided before it". Again, at page 13 of their brief, they state that the "reservation contained in the order closing the *Zo-Gale* proceeding was not part of the Plan, * * *."

Although in each instance respondents have inferred that the reservation of the parity question in the *Zo-Gale* case was contained in the order "closing the case", the fact is to the contrary. The reservation was contained in the order confirming the *Zo-Gale* plan (*Prudence Realization Corporation* v. *Geist*, *supra*, Case on Appeal R. 6).

The reservation in the order closing the Amalgamated proceeding (R. 193-195) to which these respondents apparently refer, did not reserve the parity question for determination by the federal court, but held for disposition the pending motion made by trustee in the *Zo-Gale* case for its determination, which motion had been made pursuant to the reservation in the *Zo-Gale* case (R. 193-195).

3. At page 14 of their brief, these respondents assert that the question of parity was reserved in the *Zo-Gale* case by the court itself in its own order, as part of the bankruptcy proceeding, and that distribution was to be made "in accordance with the final adjudication of such court".

In the *Zo-Gale* case the order of confirmation was submitted by the parties in the form finally signed by the court. Parity reservation was agreed upon by the parties and not inserted by the court on its own motion. It was substantially identical with the reservation contained in the *Burnside* proceeding where, in lieu of inserting it directly in the order of confirmation, since there were a substantial number of amendments to be made to the plan relating to other matters, such amendments were drawn up separately, included as an exhibit, and approved by the court in its order of confirmation. The time sequence, therefore, is exactly the same in each case with respect to the approval of the court and the question of consent.

The assertion that distribution was to be made in accordance with the determination of only the reorganization court is self-evidently fallacious. The quotation contained in respondents' brief above referred to has been taken out of context, for reference to that portion of the record to which they have referred (R. 184), will show that the phrase "such court" refers to the "court of competent jurisdiction" for whose adjudication the parity question was reserved, and was not limited to the reorganization court.

Proceeding to the merits, these respondents argue three main grounds upon which the petition should be denied, and which will be separately treated:

1. They also contend that since the bankruptcy court did not pass on it, the determination of the parity question was relegated to its status prior to and unaffected by the insolvency of either the guarantor or the certificate issue, and is determinable as a matter of state law. In support they point to the fact that the form of distribution agreed upon in the event of a determination of subordination was contrary to the federal bankruptcy rule of distribution.

As previously indicated under I of this brief, however, the supporting argument destroys respondents' premise, for the agreed upon procedure for distribution is directly contrary to the subordination requirements under state law. Respondents' argument is therefore that the federal plan didn't pass on the parity question, but disposed of the rights of the parties by an agreement entered into in accordance with federal procedure, leaving, however, to the state court as a matter of state law the determination merely as to whether the creditors' corporation should be entitled to parity or not. Upon such adjudication the state court is compelled to enter its judgment providing for distribution, not in accordance with state law, but as provided in the federal plan. Although respondents assert that the substantive rights continue as they existed prior to the filing of the petition, such assertion is refuted by their own recital of those provisions of the plan which modified those rights.

It is certainly more reasonable to recognize the fact that since the agreement as to the disposition on parity or subordination was an integral part of a federal plan, it was the intent that the determination of the legal status which would place into operation either formula for distribution would be established under the same statute pursuant to which the agreement was made effective.

No party in interest has controverted the statement that the reservation of the parity question was agreed upon solely to eliminate delay in consummating the plan. Nor may it be argued reasonably that the carrying out of such purpose effected an adverse change in the rights of petitioner to have the question determined as a matter of federal law under which its predecessor, the bankruptcy trustees of the guarantor, would have been entitled to parity.

2. It is argued that the New York rule is a rule of substantive law binding on the federal courts; that the doubt existing at the time of this Court's decision in the *Geist* case, *supra*, as to whether the New York rule is one of distribution has now been dissipated; that this Court is bound therefore to follow the rule as clarified by the New York Court of Appeals in the present case; and that the evidence of "actual intent" as implied by the New York court here concludes the issue.

An examination of the opinion in this case, however, negatives each conclusion of respondents. Presented with this Court's analysis of the New York rule in the *Geist* case, *supra*, the New York court did not question any portion of such analysis. It did not treat the rule as one misinterpreted by this Court, but reiterated its prior statements contained in decisions referred to in the *Geist* case, and which this Court characterized as establishing a rule of distribution.

Rather than asserting that its decisions were binding on the federal court, the New York court here affirmatively recognized that the federal plan or bankruptcy court order could determine the parity question as one of federal law, and held that only since, in its view, no such determination had been made, the basis for decision was therefore the state rather than the federal law (*Ferris* v. *Prudence Realization Corporation* [R. 366, 367], 292 N. Y. 210, 218).

On the question of alleged "actual intent", the documents contained in the record and discussed by the New York

Court of Appeals refute the conclusion that in this case there was actually an agreement by the guarantor to subordinate its certificates.

The certificates provide:

> "The share or part in said bond, mortgage and extension agreement represented by this certificate, is not and shall not be subordinate to any other share or shares thereof, and is not and shall not be subject to any prior interest therein" (R. 48),

and further:

> "The Corporation, The Guarantor and The Bank of America, New York, for their respective corporate accounts, may be the holder or pledgee of similar shares in said bond and mortgage, as extended" (R. 50).

They further provide:

> "1. The Corporation and/or The Prudence Company, Inc., hereinafter called the 'Guarantor,' are irrevocably authorized to collect all moneys payable under the terms of said mortgage; credit said bond, mortgage and extension agreement with payments thereon and in its own name to satisfy or assign said mortgage upon payment thereof; account to the holder of this certificate for his share of the principal and for interest at the rate of 5½% per annum thereon, payable under the terms of this certificate and to retain any balance of moneys collected;" (R. 49).

The New York Court of Appeals relied upon the last quotation for its conclusion of "actual intent" to subordinate the guarantor's certificates (*Ferris* v. *Prudence Realization Corporation* [R. 372, 373], 292 N. Y. 210, 222, 223). In reaching that conclusion it ignored the fact that the "controlling" paragraph does not deal with ownership or rights in the certificates and that it provides merely for a servicing agency and for the compensation to be received by the guarantor, not in its capacity as guarantor, but as such agent. It is to be noted that the paragraph is a grant of authority not alone to the guarantor, but to the "Corpora-

tion and/or the Guarantor", and that the language of retention of excess is used in connection with the obligation of either the corporation or the guarantor, not to pay principal or interest in connection with any guaranty, but to "account" for moneys collected as such agent (R. 49). To hold that such agency agreement, contained in the same document which provides clearly for ownership by the guarantor of certificates which shall not be subordinate to any other shares, constitutes a showing of actual intent to subordinate, is to contradict the plain intent of the English language.

Even the New York court recognizes that this language does not constitute "actual intent", for as that court stated in *Title Guarantee & Trust Company* v. *Mortgage Commission*, 273 N. Y. 145, and repeated here (*Ferris* v. *Prudence Realization Corporation*, R. 372, 373, 292 N. Y. 210, 222, 223):

> "The right of the certificate holder to preference in the distribution of the proceeds rests not only upon *presumption of intent* derived from the guaranty of the assignor, but also upon *actual intent clearly implied* in the clause of the certificate which provides that upon the collection of the proceeds of the mortgage by the assignor it shall have the right 'out of the proceeds of such collection to retain so much as may remain after paying to the holder hereof whatever may be due to such holder of principal and interest on this certificate as herein provided.'" (Italics supplied.)

Here again, therefore, the New York rule is one based upon "presumption of intent" and upon actual intent "clearly implied" by the New York court as the basis for applying its rule of subordination. Such a rule is unreasonable in its interpretation and unconscionable in its application and it is submitted that there is no reason for the federal court "to transplant, from the state to the federal courts, a doctrine which is so curiously lacking in logic and fairness as the New York rule of automatic subordination". *Geist* v. *Prudence Realization Corporation* (C. C. A. 2d), 122 F. (2d) 503, 510, dissent by Judge Frank.

The characterization by the state court of its rule as one being predicated upon intent cannot bind the federal court. As was stated by this Court in *Wragg* v. *Federal Land Bank of New Orleans*, 317 U. S. 325, 328:

> "In the interpretation and application of the Bankruptcy Act as in the case of other federal statutes, federal not local law applies. Prudence Realization Corp. v. Geist, 316 U. S. 89, 95, 62 S. Ct. 978, 982, 86 L. Ed. 1293, and cases cited. It is for the bankruptcy court to determine, by reference to the provisions of the bankruptcy statute, what rights created by state law—regardless of the characterization which may be applied to them by state statutes and decisions—are within the jurisdiction of the bankruptcy court. United States v. Pelzer, 312 U. S. 399, 402, 403, 61 S. Ct. 659, 660, 661, 85 L. Ed. 913."

See also, Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States*, pp. 159-161.

3. These respondents finally argue that within the ruling of this Court in *Prudence Realization Corporation* v. *Geist, supra*, the certificates here involved were acquired by the guarantor as an incident of its guaranty, and must therefore be subordinated. To support the argument, they refer to the fact that the guarantor's financial position was such as to necessitate its application for a $20,000,000 loan from Reconstruction Finance Corporation just prior to its acquisition of the certificates here; that its maturities were increasing and that funds were necessary in order to permit the corporation to meet interest and principal charges; that it invoked the 18 months clause contained in its guaranty as of January 1, 1932, and that the method of acquisition demonstrates the fact that they were acquired by the guarantor in order to reduce its guaranty obligation.

The argument is self-defeating, for the invocation of the 18 months clause which granted to guarantor an opportunity to defer payments of principal until July, 1933,

negatives its intent to pay off maturing securities. Moreover, the record in the present case contains a deposition of a witness called by respondents, which shows that the acquisition of the certificates here was consistent with the practice of the guarantor throughout its corporate existence and that such cerificates were acquired, as were all others, in the usual course of its business and that the primary purpose at all times on the acquisition of all certificates had been and was in this case for the purpose of keeping its customers (R. 243, 244).

Borrowing funds from Reconstruction Finance Corporation was certainly not consistent with any policy on the part of the guarantor to terminate its business but rather to continue it. The securing of such loan was intended to permit the corporation to make interest payments when due, and continue as a going business. The argument that those funds which were required in substantial amounts for the payment of such interest were used for the purpose of paying principal obligations whose maturities were postponed by agreement is inconsistent with such policy and purpose.

An examination of this Court's opinion in the *Geist* case will demonstrate that the reference to the acquisition of securities as an incident of its guaranty was made by this Court in connection with the surety cases cited by the Court at page 96 of its opinion. In the present case, as was true in the *Geist* case, the rights claimed by petitioner in the certificated mortgage were not acquired as an incident of its guaranty, nor are they asserted by way of subrogation. The relationship between the guarantor here and certificate holders was not the customary suretyship relationship considered by this Court in the *Geist* case. The making of the mortgage loan was independent of the guaranty which was given, not at the instance of the borrower, but by the guarantor after the making of the loan. Nor were the certificates or the mortgage here collateral security for the guaranty obligation. The certificates represented an undivided share in the mortgage and upon their

acquisition by Prudence, Prudence became the holder of an interest in a mortgage. That was the precise question raised and determined in *In re The Westover, Inc.* (C. C. A. 2d, 1936), 82 F. (2d) 177. As the record discloses, such interests constituted a substantial portion of its assets, were its sale inventory, and were sold by the guarantor for profit. The manner of acquisition of certificates through a "hidden" brokerage account at substantial discount was necessarily consistent with the purpose of the company in acquiring mortgage interests at less than par for future sale at a profit, and had the guarantor resold the specific certificates here involved, its purchaser would clearly have been entitled to parity.

It is submitted, however, that the discussion of the solvent surety cases by this Court in the *Geist* case and the reference to the fact of the acquisition of its certificates in the *Geist* case by the guarantor as independent of its guaranty, were an incident of this Court's analysis of the equitable rules of distribution applied by the federal court in bankruptcy proceedings. Subordination will be decreed only if it would be inequitable not to prefer a particular group of creditors. *Sampsell* v. *Imperial Paper & Color Corporation*, 313 U. S. 215. There is neither any argument nor any showing in the present case that the failure to give a preference to the *Burnside* certificate holders would be inequitable but, on the contrary, the argument made by respondents indicates that the *granting* of such a preference would be inequitable.

If any of the facts asserted by respondents are assumed to be true, it is clear that the guarantor at the time of acquisition of these securities was either insolvent or imminently insolvent. It must be conceded that in such financial condition its assets were available for pro rata distribution among all of its guaranty creditors including not alone the *Burnside* certificate holders but all other creditors. Defendants-respondents argue, however, that if Prudence took a portion of its assets then available for all creditors and purchased some of its *Burnside* guaranty claims, thereby

preferring such *Burnside* certificate holders, the result must be to benefit the remaining *Burnside* certificate holders to the extent of the certificates acquired by the guarantor from their co-tenants, and to deprive the remaining creditors of the guarantor of their pro rata share not alone of the cash or other assets used to acquire the *Burnside* certificates, but of their equivalent share in the proceeds of such acquisition.

Again, if the certificates acquired through the brokerage account are to be considered as having been acquired in a surreptitious manner at less than par, it is argued that the deception which may have been perpetrated upon the sellers of such certificates to Prudence shall result in a penalty being imposed upon the remaining guaranty creditors for the benefit, not of those deceived, but of the remaining *Burnside* certificate holders who did not join their remaining co-tenants in the sale of securities.

On either aspect, the argument of these respondents rests upon the assumption that improper action by the guarantor in acquiring certificates shall penalize one group of guaranty creditors for the benefit exclusively of another group holding similar guaranty claims. Such a rule is clearly inequitable when it is considered that petitioner is not the guaranty company but the creditors' corporation organized for the benefit of all creditors.

As to whether any preference will result in the event that certificates held by petitioner are subordinated, it is quite evident that the result of subordination in the present case is to grant to *Burnside* certificate holders an opportunity to receive full repayment of the original guaranty obligation at the expense of the remaining creditors of the guaranty company all of whom held similar guaranty agreements. No equitable basis for such preference is established by respondents. It is submitted, however, that the argument for subordination, predicated as it is upon improper conduct of the guarantor toward all creditors may not properly be utilized to benefit one group at the further expense of the remaining creditors.

III

The arguments made by respondents show the existence of a federal question which, it is submitted, has been erroneously decided by the New York Court of Appeals. There are other reorganization proceedings pending presently in the federal courts, in which petitioner is involved, and in which the same question will be raised. In each case a substantial number of certificate holders are involved and unless the present status of petitioner's certificates is clarified, continued litigation will ensue at the expense of all creditors including those petitioner represents. The argument made by defendants-respondents as to the controlling effect of the New York decision in federal court reorganizations will undoubtedly be raised, as it already has been, in federal court litigation, not alone with respect to the parity question but with other questions of state law and the binding effect of such decisions on the federal court.

Prior to the decision rendered in the instant case by the New York Court of Appeals, it was recognized that this Court's decision in *Prudence Realization Corporation* v. *Geist*, *supra*, clearly established the basis to be adopted by the federal courts in the treatment of creditors' claims in bankruptcy, where such rights were based upon either state decisions or statutes. The New York Court of Appeals in the instant case has thrown doubt on that basis. The denial of the instant petition, although it would not constitute a determination by this Court that its prior decision in the *Geist* case, *supra*, has been overruled or modified, nevertheless would be construed generally as casting doubt upon the decision in the *Geist* case. Whatever the Court's ultimate disposition of the instant case may be, it is submitted that for the purpose of clarification of bankruptcy administration, the present petition should be granted and this Court make a clear announcement of the status of creditors' rights.

Conclusion

WHEREFORE, your petitioner prays that its petition for a writ of certiorari should be granted and that the judgment entered in the Supreme Court of the State of New York, County of New York, should be reversed.

IRVING L. SCHANZER,
JAMES F. DEALY,
Counsel for Prudence Realization Corporation,
Petitioner.

August, 1944.

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CHARLES ELMORE CROPLEY
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Supreme Court of the United States

OCTOBER TERM 1941

No. 137

PRUDENCE REALIZATION CORPORATION,
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vs.

JOSEPH W. FERRIS, GEORGE L. LONG and HENRY LEFIERT as Trustees under a Declaration of Trust dated as of July 1st, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, CITY BANK FARMERS TRUST COMPANY and MARTIN S. LINDGROVE as Trustees under the Last Will and Testament of Herman Stutzer, deceased, on behalf of themselves and other holders of certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, SOLOMON ZAUDERER, MILTON KIMMELMAN, IRVING ZAUDERER and CHARLES KIMMELMAN, doing business as KIMMELMAN AND ZAUDERER, on behalf of themselves and all other holders of Prudence Bonds Corporation participating certificate issue, and HUNTER L. DELATOUR, RAYMOND REISLER and JEROME THRALLS, Trustees of Realty Associates Securities Corporation, Debtor, holders of Burnside Certificates.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK.

BRIEF ON BEHALF OF PETITIONER, PRUDENCE REALIZATION CORPORATION

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40 Mich. L. Rev. 739, 740 (1942) 29

41 Yale L. J. 315, 318 (1941) 29

Supreme Court of the United States

OCTOBER TERM 1944

No. 137

PRUDENCE REALIZATION CORPORATION,
Petitioner,

vs.

JOSEPH W. FERRIS, GEORGE L. LONG and HENRY LEFIERT as Trustees under a Declaration of Trust dated as of July 1st, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, CITY BANK FARMERS TRUST COMPANY and MARTIN S. LINDGROVE as Trustees under the Last Will and Testament of Herman Stutzer, deceased, on behalf of themselves and other holders of certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, SOLOMON ZAUDERER, MILTON KIMMELMAN, IRVING ZAUDERER and CHARLES KIMMELMAN, doing business as KIMMELMAN AND ZAUDERER, on behalf of themselves and all other holders of Prudence Bonds Corporation participating certificate issue, and HUNTER L. DELATOUR, RAYMOND REISLER and JEROME THRALLS, Trustees of Realty Associates Securities Corporation, Debtor, holders of Burnside Certificates.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK.

BRIEF ON BEHALF OF PETITIONER, PRUDENCE REALIZATION CORPORATION

Opinions Below

Written opinions have been rendered by the Additional Special Term Justice (R. 221, not reported), by the Ap-

pellate Division, First Department of the Supreme Court of the State of New York, County of New York (R. 231, reported at 266 App. Div. 543), and by the New York Court of Appeals (R. 241, reported at 292 N. Y. 210).

Jurisdiction

The judgment and order of the New York Court of Appeals was entered on March 10, 1944 (R. 234), and the judgment of the Supreme Court, New York County, was entered thereon on April 20, 1944 (R. 238). The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended (28 U. S. C. A., Sec. 344(b)).

Questions Presented

The New York Court of Appeals held its own decisions controlling on the question of creditor participation in an insolvent estate which had been reorganized under Section 77B of the Bankruptcy Act. The property reorganized was real estate and a mortgage thereon, against which participation certificates had been issued. The 77-B trustees of the insolvent guarantor held some of the certificates. Solely to avoid delay in consummating the 77-B Plan for the Certificate Issue, it was amended so as to provide that no distribution should be made thereunder upon such certificates until an adjudication was had by a "court of competent jurisdiction" of the rights to participation with respect to such certificates. The plan as so amended was confirmed and the reorganization proceeding closed. Thereafter, an action was instituted in the New York State courts wherein the plaintiffs prayed for adjudication of the rights of participation to which the certificates held by the insolvent guarantor were entitled. Petitioner is the creditors' corporation organized pursuant to the plan of reorganization of the bankrupt guarantor and succeeded to its rights.

Named as a defendant, it demanded judgment decreeing that it was entitled to parity of treatment with other certificate holders on the ground that since the certificate issue and the guarantor had been reorganized under Section 77B of the Bankruptcy Act and the question of participation on account of its certificates had been reserved in the manner and circumstances above described, such question was determinable in accordance with federal law and that under applicable federal decisions its certificates were entitled to parity of treatment with those held by others. The Appellate Division of the New York Supreme Court unanimously upheld petitioner's view and ordered judgment in its favor on the authority of *Prudence Realization Corporation* v. *Geist*, 316 U. S. 89 (R. 233). The Court of Appeals reversed, holding that the question of parity was one of state law and that under local law petitioner's certificates are subordinate to other certificates (R. 241). The principal questions involved are:

1. Did the state court litigation necessarily involve adjudication of substantial title, rights, privileges or immunities specially set up or claimed by petitioner under the Constitution or statutes of the United States?

2. In construing the provisions of a Plan adopted in a reorganization proceeding under Section 77B of the Bankruptcy Act, was the state court correct in failing to give effect to the provisions of the Bankruptcy Act and the decisions of this court thereunder?

3. Was the state court correct in disregarding the effect of bankruptcy reorganization proceedings for the certificate issue and the guarantor and in applying local law alone in determining the rights of the guarantor's creditors to participate in the proceeds of the certificate issue?

4. Was the state court correct in construing a provision in a federal plan of reorganization not alone as a grant of concurrent jurisdiction to a state court, but as a surrender of creditors' rights under the Bankruptcy Act as well?

Statement

The Prudence Company, Inc., hereafter called "Prudence" was organized under the Banking Law of the State of New York in 1919. It was engaged in the business of making loans secured by mortgages on real estate. The bonds and mortgages received for such loans were assigned to an affiliated corporation, Prudence-Bonds Corporation. In many instances, Prudence-Bonds Corporation transferred these bonds and mortgages to corporate trust companies called depositaries and issued certificates of participation in such mortgages to Prudence which in turn sold them to the general public together with its guaranty of payment of principal and interest. The guaranty of Prudence called for the payment of interest on the certificates when due and for the payment of principal within eighteen months after maturity (R. 36). These mortgage participation certificates constituted the holders tenants in common of the underlying bond and mortgage (*In re Westover* [C. C. A. 2d], 82 F. [2d] 177).

As part of its business, from time to time Prudence either repurchased some of these certificates from the investing public or received them in exchange for certificates in other mortgages.

Prudence Realization Corporation, the petitioner here, was organized pursuant to a plan of reorganization for Prudence under Section 77B of the Bankruptcy Act (R. 16). The plan was proposed by Reconstruction Finance Corporation, the largest single creditor of Prudence, after a finding had been made that Prudence was insolvent. The plan provides that the stockholders of Prudence have no interest in the liquidation of its assets and provides for the distribution of the proceeds of such liquidation to creditors only (R. 16). Petitioner is therefore a creditors' realization corporation and in no way represents interests of the old stockholders.

The Burnside Certificate Issue was created in the general manner above described. The mortgage originally in the principal sum of $1,200,000 was reduced by payment to $1,016,000. The certificates to the extent of $1,016,000 are presently outstanding (R. 14). Included in the assets of the insolvent Prudence estate transferred to petitioner are $431,212.86 in principal amount of Burnside certificates which were repurchased in the regular course of its business by Prudence during 1932 and 1933 (R. 15, 40). These certificates were included in the corporate assets of Prudence as evidenced by published financial statements and corporate balance sheets prepared by certified public accountants (R. 142).

In January, 1935, an involuntary petition for the reorganization of Prudence under Section 77B of the Bankruptcy Act was filed in the Eastern District Court and on February 1, 1935, the petition, consolidated with the debtor's voluntary petition for reorganization, was approved and trustees appointed. An order was entered in that proceeding prescribing the procedure for the filing of proofs of claim by creditors including certificate holders of the Burnside Certificate Issue who were unsecured creditors of the debtor. In these proofs of claim certificate holders asserted unsecured claims for the full principal and interest due on the Prudence guaranty of the certificates held by them (R. 133, 138) and they were allowed as such.

On March 16, 1936, pursuant to authorization secured in the Prudence proceeding, the petition for reorganization of Amalgamated Properties, Inc., a subsidiary of Prudence, was approved by the Eastern District Court (R. 14). Included among its assets was the real property subject to the Burnside Certificate Issue mortgage, and in that proceeding a plan of reorganization for that issue was proposed which provided for the transfer of the real property by Amalgamated to three trustees appointed for certificate holders who also, pursuant to said plan, ac-

quired the certificated mortgage. The lien of the mortgage was preserved for the benefit of all the certificate holders who also became co-owners of the real estate. That plan of reorganization for the Burnside Issue, as amended, was finally approved by the District Court on June 14, 1938 (R. 15), and the property together with the outstanding mortgage was transferred to Joseph W. Ferris, George L. Long and Henry Lefiert, trustees, respondents herein (R. 174).

The plan of reorganization for the Burnside Issue did not distinguish between rights of the Prudence trustees and other holders of certificates to participate in the proceeds of the trust estate. A question, however, arose as to the right of the Prudence trustees to share on a parity with other holders of certificates, in view of the fact that Prudence had guaranteed the payment of principal and interest of the certificate issue. In order to avoid delay in the consummation of the plan, the plan was amended by agreement so as to provide that no distributions should be made thereunder on the Prudence-held certificates until the rights of such certificates were adjudicated by "a court of competent jurisdiction" (R. 16). This amendment to the plan was approved by the judge in charge of the proceeding in his order confirming the plan (R. 129). The order approving the amendments and confirming the plan did not separately classify the Prudence trustees (R. 112, 113).

The plan of reorganization for Prudence was confirmed by the District Judge in charge of that proceeding and of the proceeding for the reorganization of the Burnside Certificate Issue on May 26, 1939, ten months after the Burnside plan had been approved (R. 87). In accordance with its provisions, all of the assets of Prudence and its trustees were transferred and assigned to petitioner, the creditors' realization corporation, by assignment dated June 1, 1939. As is set forth in the order confirming the Prudence plan, there were outstanding obligations of Prudence aggregating $133,713,000 (R. 46). Of these claims only the

claim of the United States of America for $400,000 has been fully paid.

Prior to the institution of the proceeding for the reorganization of Prudence and in June, 1932, all of the stock of its wholly owned subsidiary, Amalgamated Properties, Inc., had been deposited as part of the collateral for a loan made by Reconstruction Finance Corporation to Prudence. In 1938, in accordance with the decision of the Circuit Court of Appeals for the Second Circuit (*In re The Prudence Company, Inc.*, 90 F. [2d] 587), the ownership of that subsidiary of Prudence passed from the bankrupt estate to Reconstruction Finance Corporation. During 1940, as a result of negotiations between Reconstruction Finance Corporation and petitioner, a claim of petitioner against Amalgamated was assigned to a subsidiary of Reconstruction Finance Corporation in exchange for certain assets of Amalgamated. Upon the consummation of this compromise Reconstruction Finance Corporation's subsidiary became the sole creditor and stockholder of Amalgamated and sought the dismissal of the reorganization proceedings relating to Amalgamated since no reorganization was necessary. In order to accomplish such a dismissal it was necessary to close the proceedings for the reorganization of the several certificate issues which had been reorganized in the Amalgamated proceeding, including the Burnside Certificate Issue. For that reason, and that alone, an order was entered closing the Burnside Certificate Issue reorganization proceeding (R. 134).

In May, 1940, the trustee appointed as a result of a plan of reorganization for the Zo-Gale Certificate Issue, which also had been reorganized in the Amalgamated proceeding, started a proceeding in the federal court in the Amalgamated proceeding to determine the parity question which had been reserved in the Zo-Gale plan for adjudication by "a court of competent jurisdiction". That application had not yet been determined by the District Court.

Under these circumstances the order dismissing the Amalgamated proceeding specifically reserved jurisdiction in the federal court with respect to the pending motion for the determination of the parity question in the Zo-Gale Issue (R. 135).

The District Court's opinion in the *Zo-Gale* case was rendered on January 25, 1941, holding that the Prudence-held certificates were subordinated. The court there held that the law of the State of New York was controlling on the issue and that under such decision other holders of certificates were entitled to priority in the distribution of the proceeds of the Zo-Gale estate.

In August, 1941, the United States Circuit Court of Appeals for the Second Circuit affirmed by a divided court the decision of the District Judge in the *Zo-Gale* case (*Geist* v. *Prudence Realization Corporation*, 122 F. [2d] 503). This Court on January 5, 1942, granted a petition for a writ of certiorari to the United States Circuit Court of Appeals in the *Zo-Gale* case, and on April 28, 1942, rendered its decision unanimously reversing the decision of the Circuit Court of Appeals in the *Zo-Gale* case, and held that the question of parity was one of federal law and that under the Bankruptcy Act petitioner, as representative of the creditors of the insolvent guarantor, was entitled to a position of parity with all other certificate holders (*Prudence Realization Corporation* v. *Geist*, 316 U. S. 89).

Immediately after the District Court decision was rendered in the *Zo-Gale* case, and on February 25 and 26, 1941, complaints were served upon petitioner by the trustees-respondents and by holders of Burnside certificates suing in a respresentative capacity, in actions for declaratory judgments instituted in the Supreme Court of the State of New York, County of New York, by which actions the plaintiffs sought to secure a determination that the certificates held by petitioner in the Burnside Certificate Issue were subordinated to certificates held by others. Answers were filed by other certificate holders

seeking equivalent relief by cross-complaint against petitioner. Answers were interposed by petitioner which denied that the certificates held by it were to be subordinated and, further, urged as affirmative defenses that in view of the reorganization of the certificate issue and the guarantor in the federal court under the provisions of the Bankruptcy Act, the question of participation in the distributions of the proceeds of the Burnside Certificate Issue was a question of federal law as to which the provisions of the Bankruptcy Act and the federal decisions thereunder were controlling (R. 182). The actions were thereafter consolidated.

After this Court's decision in the *Geist* case, petitioner moved in the Additional Special Term of the Supreme Court of New York County for summary judgment (R. 8). No issues of fact were presented and all parties agreed that the matter could be disposed of as a matter of law, the primary question being whether this Court's decision in *Prudence Realization Corporation* v. *Geist, supra,* was controlling, or whether the issue was determinable solely as a matter of New York law (R. 221). As part of the record a deposition was taken of a witness called by respondents (R. 142, 220). The Justice at Additional Special Term denied the motion for summary judgment (R. 221). Appeals were taken from the order entered upon that decision by all the interested parties and the Appellate Division of the Supreme Court of the State of New York, First Department, unanimously reversed the Special Term and held that where the certificate issue and the guarantor are reorganized in the federal court, the question of participation in the assets of the insolvent certificate issue is one of federal law and that under the decision of this Court in *Prudence Realization Corporation* v. *Geist, supra,* the certificates held by petitioner are entitled to parity with all other certificate holders (*Ferris et al.* v. *Prudence Realization Corporation*, 266 App. Div. 543 (R. 232).

Appeals were taken from the judgment entered upon that decision by the trustees-respondents and by City Bank Farmers Trust Company and Martin S. Lindgrove, etc., certificate holders. The New York Court of Appeals reversed the Appellate Division. It determined that since the question of parity had been reserved for determination by a "court of competent jurisdiction," and the federal court had not determined the issue in the reorganization proceeding, the question was left for determination by the New York court exclusively as a matter of local law. Upon that basis the New York Court of Appeals purported to distinguish this Court's opinion in *Prudence Realization Corporation* v. *Geist*, omitting, however, reference to the fact that the question of parity in that case similarly had been reserved for adjudication by "a court of competent jurisdiction" (R. 241).

Specification of Errors

The New York Court of Appeals erred

1. in holding that the certificates of participation in the Burnside Certificate Issue owned by Prudence Realization Corporation are not entitled to parity of distribution with certificates held by others but are subordinate to such certificates;

2. in holding that the question of parity was determinable as a matter of New York law;

3. in failing to hold that since the Burnside Certificate Issue and The Prudence Company, Inc., the guarantor, were reorganized in the federal court under Section 77B of the Bankruptcy Act, the question of parity was determinable as a matter of federal law;

4. in failing to hold that, in accordance with the provisions of the Bankruptcy Act and the decision of this Court in *Prudence Realization Corporation* v. *Geist*, 316 U. S.

89, Prudence Realization Corporation is entitled to share equally with other certificate holders in the proceeds of the Burnside Certificate Issue;

5. in holding that the plan of reorganization for the Burnside Certificate Issue contained no provision with reference to Burnside Certificate Issue certificates held by petitioner.

Summary of Argument

POINT I—THE STATUS OF PETITIONER'S CERTIFICATES IS DETERMINABLE UNDER FEDERAL LAW.

POINT II—THE NEW YORK RULE IS A LOCAL RULE NOT BINDING ON THE FEDERAL COURT.

POINT III—UPON EQUITABLE GROUNDS PETITIONER'S CERTIFICATES ARE ENTITLED TO PARITY.

POINT IV—THE JUDGMENT ENTERED ON THE DECISION OF THE NEW YORK COURT OF APPEALS IS ERRONEOUS AND SHOULD BE REVERSED.

POINT I

The status of petitioner's certificates is determinable under federal law.

In *Prudence Realization Corporation* v. *Geist*, 316 U. S. 89, this Court held that petitioner's certificates in a certificate issue similar to the one here involved, and similarly reorganized, were on a parity with certificates held by others. In the order confirming the plan of reorganization in that case, the question of parity had been reserved for adjudication by a "court of competent jurisdiction". The controversy was submitted to the federal court by a motion,

made by the trustee appointed in the order confirming the plan of reorganization, for an order subordinating this petitioner's certificates.

In concluding that petitioner's certificates were entitled to a parity status, this Court treated the question as one involving the determination of petitioner's claim in the bankruptcy proceeding. *Prudence Realization Corporation* v. *Geist*, *supra*, at page 97. As bases upon which the allowance or rejection of such a claim should be determined, the Court referred to the Bankruptcy Act requirements of equality of distribution and that a plan of reorganization shall be fair and equitable. The Court further noted that the plan contemplated by the Bankruptcy Act shall "not discriminate unfairly in favor of any class of creditors" (Ibid, at p. 93).

In emphasizing that the question was one for determination in accordance with the Bankruptcy Act, the Court disposed of the argument advanced that the New York law was determinative of the participating rights of creditors in the proceeds of a bankrupt's estate and said at page 95:

> "The bankruptcy act prescribes its own criteria for distribution to creditors. In the interpretation and application of federal statutes, federal not local law applies. See *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209; *Chesapeake & Ohio Ry.* v. *Martin*, 283 U. S. 209, 212-213; *Board of Comm'rs* v. *United States*, 308 U. S. 343, 349-350; *Deitrick* v. *Greaney*, 309 U. S. 190, 200; *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296. The court of bankruptcy is a court of equity to which the judicial administration of the bankrupt's estate is committed, *Securities and Exchange Commission* v. *U. S. Realty Co.*, 310 U. S. 434, 455-457, and it is for that court—not without appropriate regard for rights acquired under rules of state law—to define and apply federal law in determining the extent to which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy requires its subordination to other claims which, in other respects, are of the same class. Cf. *Taylor* v. *Standard Gas Co.*, *supra*; *Pepper* v. *Litton*, *supra*."

The nature of the guaranty obligation and the fact of the guarantor's bankruptcy were considered as elements determining whether on equitable grounds the bankruptcy court would have been justified in subordinating petitioner's certificates under the Bankruptcy Act.

Nothing contained in the opinion indicated that the reservation of the parity question for future determination meant anything other than that the determination of petitioner's claim was being postponed. This Court did not treat such postponement as constituting any diminution in the rights of the claimant to secure a determination in accordance with the Bankruptcy Act, nor as any waiver of the right to secure such a determination. On the contrary, the language of the opinion clearly indicates that the issue involved was determinable exclusively in accordance with the provisions of the Bankruptcy Act.

In determining that petitioner's certificates were entitled to parity, this Court gave effect to the bankruptcy of the guarantor in deciding that there was no equitable justification for a subordination decree which would grant preference to one group of the guarantor's creditors at the expense of the remaining creditors holding similar guaranty claims. At page 97 this Court said:

> "The Prudence Company is not solvent. Its property is being liquidated in bankruptcy where all the claimants on its present and other guaranty obligations are entitled to share equally in its unpledged assets. Denial of the right to prove its claim, which is an asset in which all of Prudence's creditors are otherwise entitled to share, will serve only to divert this asset from all creditors to one class of creditors, the Zo-Gale certificate holders, and thus give to them the exclusive benefit of a security for which they have not bargained. Allowance of the Prudence Company's claim does not involve any breach of its duty as guarantor. Nor does it deprive certificate holders of their right to share in this asset *pari passu* with the other creditors, or of any right, legal or equitable, to which they are entitled by virtue of their position as guaranteed

creditors. See *Hampton* v. *Phipps*, *supra*; *Prairie State Bank* v. *United States*, 164 U. S. 227; *Henningsen* v. *United States Fidelity & Guaranty Co.*, 208 U. S. 404."

The conclusion that there was no equitable basis for subordinating petitioner's certificates in the *Geist* case was based upon this Court's analysis of the Bankruptcy Act and the rights of creditors of the bankrupt guarantor as established by that statute. The determination was not based upon the choice of the federal forum for the ultimate litigation of the status of petitioner's claim, but on the fact that the guarantor and the certificate issue had been reorganized in the federal court under the Bankruptcy Act, and that the status of petitioner's claim must be determined in accordance with the Act, regardless of where or when the issue was ultimately litigated.

In the present case, the New York Court of Appeals has disregarded the true import of the *Geist* case. It has interpreted the reservation of the parity question for adjudication by a "court of competent jurisdiction" as a license to ignore the bankruptcy of the guarantor and the Section 77B reorganizations of the guarantor and the certificate issue. This conclusion is contained in the following excerpt from its opinion:

> "Upon this record it appears without contradiction that the Burnside plan of reorganization did not attempt to define or determine the relative rights of Realization Corporation as the holder of certificates acquired by Prudence and of other holders of Burnside certificates, nor was any determination of these rights made in the Bankruptcy Court in the course of its administration or in connection with the distribution of any of the assets either of Prudence or of Amalgamated. The controversy, therefore, was brought to the State courts, as contemplated by the plan of reorganization, for determination of these relative rights unaffected by the reorganization consummated in the Federal court.

"Corporate reorganization in the Federal courts is a process of adjustment and modification of legal rights frequently involving the impairment of contractual obligations under plans predicated upon the consent of security holders and creditors and upon the court's approval of the plan as fair and equitable and therefore binding upon the minority. If neither the plan nor any order in the proceeding undertakes to modify the legal rights but leaves those rights to be determined by courts of competent jurisdiction, such courts have no power to impair the legal or equitable rights of the parties. The court below erroneously regarded the *Geist* case as establishing a rule. It was only effective in determining a question affecting the administration and distribution of assets in the particular reorganization before the court. To conclude that our decision is ruled by the decision of the Supreme Court in the *Geist* case, we should have to modify the Burnside plan of reorganization, which did not undertake to determine, define or modify the relative rights of certificate holders under the Burnside mortgage." (*Ferris* v. *Prudence Realization Corporation*, 292 N. Y. 210, at pp. 218, 219.) (R. 245, 246).

The Court of Appeals not alone disregarded the basis of the *Geist* case, but some of the relevant facts in the present case as well. In the first place, the relative rights of petitioner and other holders were specifically modified by the plan. The plan provided that if the Prudence certificates were not entitled to parity, then the income which would have been payable on the certificates should be distributed one-half to other certificate holders and one-half to the sinking fund for the purchase of certificates. The "court of competent jurisdiction" was required merely to determine whether the Prudence certificates were or were not entitled to parity. It could not determine that question unaffected by the reorganization and exclusively as a state law question, because the provision in the plan for the disposition of the income, if subordination was decreed, was on a basis wholly inconsistent with state law. Thus, it could not have been contemplated

by the plan, as held by the Court of Appeals, that the controversy should go to the state court for determination unaffected by the reorganization. On the contrary, no matter what the forum was, it was necessary to interpret the rights of the parties under the plan of reorganization in bankruptcy. Such a question necessarily could not be unaffected by the reorganization proceeding.

Secondly, even if the plan itself did not specifically provide for the distribution of the fund dependent upon whether or not the Prudence certificates were entitled to parity, there would still remain the question of the effect the bankruptcy had on what otherwise would have been the rights of the parties.

As indicated, the interpretation of the reservation language was before this Court in the *Geist* case. There, as here, the creditors' realization corporation was the petitioner. Respondent was, as here, the trustee appointed in the order confirming the certificate issue plan of reorganization. The language of reservation was substantially identical with that in the instant case:

Prudence Realization Corporation v. Geist, supra Case on Appeal (R. 6)	Ferris v. Prudence Realization Corporation (R. 243, 244)
"Some question has arisen with respect to the rights of The Prudence Company, Inc. on account of $816.67 of Certificates held or claimed by that Company and its Trustees, and question has also arisen with respect to the interest in said Mortgage (being the $7,200 principal amount thereof not represented by outstanding Certificates) owned or claimed by The Prudence Company, Inc. and its Trustees and/or by Prudence-Bonds Corporation and its Trustees."	"A question has arisen with respect to the rights of The Prudence Company, Inc., or its Trustees on account of the certificates held or claimed by them, including so-called 'unissued certificates.'"

Prudence Realization Corporation v. Geist, supra Case on Appeal (R. 6)	Ferris v. Prudence Realization Corporation (R. 243, 244)
Anything in the Amended Plan the contrary notwithstanding, e Trustee under the Amended an shall make no distributions cash and/or securities on ac- unt of the Certificates now ld or claimed by The Prudence mpany, Inc. and its Trustees, on account of the part of said ortgage which is not repre- nted by outstanding Certifi- tes, *unless and until it shall ve been finally adjudicated by court of competent jurisdiction* at The Prudence Company, Inc. d its Trustees and/or Pru- nce-Bonds Corporation and its ustees are entitled to share in e trust estate by reason there- ." (Italics supplied.)	"Anything in the Plan to the contrary notwithstanding, the Trustees to be appointed hereunder shall make no distributions of cash or other property or securities which would be otherwise distributable on account of the certificates now held or claimed by The Prudence Company, Inc., or its Trustees, including said 'unissued certificates,' *unless and until it shall have been finally adjudicated by a Court of competent jurisdiction* whether or not The Prudence Company, Inc. or its Trustees, or their successors or assigns, are entitled to receive such cash or other property or securities and to share in the proceeds of the property to be assigned to the Trustee pursuant to the Plan and on a parity with other certificate holders or otherwise." (Italics supplied.)

In each case the litigation to determine the parity question was instituted after the consummation of the plans, and sought the same relief.

The only factual variations in the two cases are that in the *Geist* case the trustee of the reorganized certificate issue selected the federal forum as the most expedient, and in the present case the respondent trustees, holding a similar position, selected the state court as the forum for determination, and that in the *Geist* case the proceeding was instituted prior to the closing of case and in the present case the action was instituted after such closing.

Unless these factual variations are sound bases for distinction between the two cases, it would appear that the

conclusion of the Court of Appeals that the plan contemplated that the parity question be determined as a matter of state law directly contradicts the decision in the *Geist* case.

The reservation of the question for determination by "a court of competent jurisdiction" having been inserted in the plan for the purpose of avoiding delay in consummation could mean only what the phrase could mean any time, namely, that the question be reserved for adjudication at a later time in a suit between the same parties instituted in any court having personal jurisdiction over such parties. Such grant of concurrent jurisdiction to such a court does not constitute an agreement by the parties that their status shall be altered or amended, and that such succeeding litigation should be unaffected by intervening bankruptcy.

This Court in *Local Loan Co.* v. *Hunt*, 292 U. S. 234, discussed the question of concurrent jurisdiction in connection with the competency of a state court to determine whether an assignee of future wages could sue in the state court against the employer of a debtor who had received a discharge in bankruptcy. There the Illinois state court had previously held that it would refuse to give effect to the discharge in bankruptcy and would permit the action to proceed to judgment. An injunction was sought in the federal court restraining the continuation of the state court action not because the state court lacked power to adjudicate the question, but because the prior state court decisions indicated that it would here render a judgment which would be "destructive of the purpose and spirit of the bankruptcy act". This Court sustained the injunction. In considering the competency of the state court's jurisdiction this Court said at page 241:

> "So far as appears, the municipal court was competent to deal with the case. * * * And it may be conceded that the municipal court was authorized in the law action to afford relief the equivalent of that which respondent now seeks in equity."

In the present case nothing in prior decisions by the New York Court had indicated that it would refuse to give effect to a federal decision interpreting the rights of a bankrupt's creditors between themselves. No ground for injunction, therefore, was available to petitioner here upon the institution of the state court action. In the present case, as was true in *Local Loan Co.* v. *Hunt, supra,* the state court was competent to determine the controversy submitted to it. However, the competency of the court did not free it of the obligation to apply the proper federal law to the determination of the controversy.

Particularly is this true in the present case, where it must be conceded that the litigation of the parity question could have proceeded at the instance of either the petitioner or the respondents in either the federal or the state courts and either before or after the closing of the case. The plan does not define a "court of competent jurisdiction", nor specify the time when the determination should be made. Moreover, the plan provides that the trustees respondents shall account annually to a court identified in the plan as the New York Supreme Court (R. 98). It is clear that had the parties intended that the "court of competent jurisdiction" be the same state court, the language would have been similarly specific.

The other ground upon which the *Geist* case might be distinguished is the fact that in the present suit the proceeding was instituted after the closing of the reorganization proceeding for the certificate issue. Since the proceeding could have been instituted prior to the closing of the case, the delay in institution should not affect the rights as they existed at the date when the action could have been started. No statute of limitations or other procedural device fixing time is involved here, but merely the determination of substantive rights. Particular emphasis cannot be placed upon the closing of the Amalgamated proceeding since the closing of any case in bankruptcy reorganization

is effected solely for the benefit of the debtor. The closing order contains the bar order freeing the debtor from claims against it. The creditors are affected only to the extent that they are enjoined from prosecution of any actions against the debtor. The plan having been consummated, the property having been transferred and new securities issued, the creditor has no further claim against the debtor and the closing order is a pro forma order entered disposing of the case.

The same procedural steps relating to the consummation of the plan, the transfer of the property, the issuance of the new or amended securities were effected in the *Geist* case and in the present case. As appears from the record here, the closing order was required by the debtor corporation for its own purposes (R. 134).

It is clear that the procedure adopted by the debtor *after* the reservation could not adversely affect the rights of petitioner as they existed at the time of the reservation. The parity question remained determinable as it would have been had there been no closing order entered prior to its determination. The closing order in a reorganization proceeding is the counterpart of a discharge in bankruptcy. Rights fixed by bankruptcy are not lost by the discharge, nor may the parties proceed without regard to it. In *Local Loan Co.* v. *Hunt*, *supra*, the bankrupt had been discharged, but the Court granted injunctive relief to protect the bankrupt against the state court's usurpation of federal prerogative.

The identity in relevant facts disposes of the purported distinction between the *Geist* case and the present one. The basic issue is the one presented and decided in the *Geist* case: whether, under Bankruptcy Act rules of distribution, petitioner's certificates are entitled to parity.

POINT II

The New York rule is a local rule not binding on the federal court.

In the *Geist* case, this Court analyzed the New York rule and stated that in the absence of an actual agreement to subordinate the guarantor, it is merely a general rule of law governing insolvency proceedings, and is not controlling in bankruptcy. *Prudence Realization Corporation* v. *Geist*, *supra*, at p. 97. This Court made its own analysis of the certificate to determine the existence or non-existence of an agreement to subordinate, and did not rely upon that offered by the Court of Appeals in that court's persistent policy of subordination.

In opposing the granting of the petition for a writ of certiorari here, respondents contended, and probably will again contend, that the New York rule is a substantive rule of intent and therefore binding on this Court.

An examination of the opinion in this case, however, negatives these contentions. Confronted with this Court's analysis of the New York rule in the *Geist* case, *supra*, the New York court merely reiterated its prior statements contained in decisions referred to in the *Geist* case. Although in an apparent effort to take this case outside the scope of the *Geist* decision the court stated that this was not a proceeding in bankruptcy or a state liquidation proceeding, the court repeated that the rule subordinating a guarantor is operative where there are "insufficient proceeds of the debt". (*Ferris* v. *Prudence Realization Corporation*, 292 N. Y. 210, 222) (R. 249, 250).

The New York court here affirmatively recognized that the federal plan or bankruptcy court order could determine the parity question as one of federal law, but held that since, in its view, no such determination had been made, and the parties by inserting the reservation in the plan had agreed that the parity question should be determined in accordance with state law, the basis for decision was

therefore the state rather than the federal law (*Ferris v. Prudence Realization Corporation, supra*, at p. 218) (R. 246).

On the question of alleged "actual intent", the documents contained in the record and discussed by the New York Court of Appeals refute the conclusion that in this case there was actually an agreement by the guarantor to subordinate its certificates.

The certificates provide:

> "The share or part in said bond, mortgage and extension agreement represented by this certificate, is not and shall not be subordinate to any other share or shares thereof, and is not and shall not be subject to any prior interest therein" (R. 32);

and further:

> "The Corporation, The Guarantor and The Bank of America, New York, for their respective corporate accounts, may be the holder or pledgee of similar shares in said bond and mortgage, as extended" (R. 34).

They further provide:

> "1. The Corporation and/or The Prudence Company, Inc., hereinafter called the 'Guarantor,' are irrevocably authorized to collect all moneys payable under the terms of said mortgage; credit said bond, mortgage and extension agreement with payments thereon and in its own name to satisfy or assign said mortgage upon payment thereof; account to the holder of this certificate for his share of the principal and for interest at the rate of 5½% per annum thereon, payable under the terms of this certificate and to retain any balance of moneys collected;" (R. 33).

The New York Court of Appeals relied upon the last quotation for its conclusion to subordinate the guarantor's certificates (*Ferris* v. *Prudence Realization Corporation*, 292 N. Y. 210, 222, 223) (R. 249-251). In reaching that conclusion it ignored the fact that the "controlling" paragraph does not deal with ownership or rights in the certificates

and that it provides merely for a servicing agency and for the compensation to be received by the guarantor, not in its capacity as guarantor, but as such agent. It is to be noted that the paragraph is a grant of authority not alone to the guarantor but to the "Corporation and/or the Guarantor", and that the language of retention of excess is used in connection with the obligation of either the corporation or the guarantor, not to pay principal or interest in connection with any guaranty, but to "account" for moneys collected as such agent (R. 33). To urge that such agency agreement, contained in the same document which provides clearly for ownership by the guarantor of certificates which shall not be subordinate to any other shares, constitutes evidence of actual intent to subordinate, is to contradict the plain intent of the English language.

Further, it would appear clear that any alleged ambiguity which might exist as to the contractual right of the guarantor to parity is dissipated by the affirmative provision that the guarantor, for its corporate account, may be the holder or pledgee of similar shares in the bond and mortgage (R. 34). If the certificate is considered as providing for subordination, then this provision is meaningless. Surely the guarantor could hold subordinated certificates without contractual approval. It contradicts any normal reading to conclude that such a provision authorizing the holding of similar certificates, not alone as owner but as pledgee as well, does not clearly provide for parity, and it contradicts common sense to assert that the guarantor would provide that if it accepted such certificates as a pledge for a loan, and took title upon default, then the certificates so acquired would be subordinated.

Even the New York court recognizes that the language in this certificate does not constitute "actual intent", for as that court here stated:

> "Here, as in the other cases, there are clauses which, standing alone, might be taken to indicate parity of treatment as between the guarantor and the other

certificate holders. This was true in *Matter of Title & Mortgage Guaranty Co.* (*supra*) and in *Matter of People* (*Union Guar. & Mtg. Co., supra*). When there is ambiguity in the agreement relied upon by the guarantor in support of a claim of parity, the rule denying parity to the guarantor is enforced." (*Ferris* v. *Prudence Realization Corporation, supra*, at p. 223) (R. 250, 251).

The rule referred to, denying parity to the insolvent guarantor, is the same rule considered by this Court in the *Geist* case. In the New York court, where a guarantor-creditor relationship exists, the court will presume an intention by the guarantor to subordinate its interests, retained or reacquired, to the interests of its assignees where the proceeds of the securities are insufficient. *Matter of Title & Mortgage Guaranty Co.*, 275 N. Y. 347, 352. Such presumption is rebuttable only by language in the certificates which must be "so clear and unmistakable that the courts would be compelled to give effect to the intent of the parties as expressed in the writing. Otherwise the equitable rule should prevail." (*Pink* v. *Thomas*, 282 N. Y. 10, 12.)

It seems clear that the rule is one of presumed intent, and that the guarantor, in seeking to rebut the presumption, is limited to the language of the certificate, which must be "so clear and unmistakable" as to compel the court to carry out such intent. No proof as to actual intent to provide for parity is deemed pertinent. And the presumption rests solely on the court's own view as to an equitable result. In substance, therefore, the court has established its own rule of distribution and has fixed the strict limits within which its own rule may be overcome. It then proceeds to "interpret" the language of what it has designated as the sole pertinent document. If, by its characterization of such a rule as being based upon a contract and its "black-is-white" construction of clear language, it could bind the bankruptcy court to the state's method of insolvency distribution, uniformity in bankruptcy administration and distribution would be destroyed.

A situation similar in principle to the one here presented was decided by this Court in *American Railway Express Company* v. *Levee*, 263 U. S. 19. Respondent had instituted an action in the Louisiana court to recover the value of a lost trunk. The railroad had relied on the limitation of liability in accordance with the regulations of the Interstate Commerce Commission. The Louisiana code provided that the burden was on the carrier to show that the loss was occasioned by accidental and uncontrollable events. This Court granted a petition for a writ of certiorari to the Court of Appeal of Louisiana, and in reversing the judgment in favor of the plaintiff Mr. Justice Holmes said at page 21:

> "Coming to the merits, the limitation of liability was valid, whatever may be the law of the State in cases within its control. *Adams Express Co.* v. *Croninger*, 226 U. S. 491. *Union Pacific R. R. Co.* v. *Burke*, 255 U. S. 317, 321. *American Ry. Express Co.* v. *Lindenburg*, 260 U. S. 584. The effect of the stipulation could not have been escaped by suing in trover and laying the failure to deliver as a conversion if that had been done. *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197. No more can it be escaped by a state law or decision that a failure to deliver shall establish a conversion unless explained. The law of the United States cannot be evaded by the forms of local practice. *Rogers* v. *Alabama*, 192 U. S. 226, 230."

The presumption of a conversion, based upon the failure to deliver unless explained within the narrow limits prescribed by the code, is analogous to the presumption of intent to subordinate established by the New York court in the parity cases and the limitation upon the proof admissible in rebuttal. It is submitted that Mr. Justice Holmes' opinion in the above case similarly is here applicable.

Where a federal right is involved, this Court has examined the facts and the conclusions of a state court and reversed where it believed that the federal right was denied by the interposition of a non-federal ground of

decision having no fair support. *Creswill* v. *Knights of Pythias*, 225 U. S. 246; *Ward* v. *Love County*, 253 U. S. 17; *Davis* v. *Wechsler*, 263 U. S. 22; *Ancient Egyptian Order of Nobles of the Mystic Shrine* v. *Michaux*, 279 U. S. 737.

This Court's power to analyze the local rule to determine its true basis has been reaffirmed on many occasions. Recently, in determining whether a right of redemption was a property right subject to the jurisdiction of the bankruptcy court as against a claim that under Alabama law it was a personal rather than a property right, this Court said:

> "But §75 prescribes its own criteria for determining what property interests may be brought within the jurisdiction of the court. In the interpretation and application of the Bankruptcy Act as in the case of other federal statutes, federal not local law applies. *Prudence Realization Corp.* v. *Geist*, 316 U. S. 89, 95, and cases cited. It is for the bankruptcy court to determine, by reference to the provisions of the bankruptcy statute, what rights created by state law—regardless of the characterization which may be applied to them by state statutes and decisions—are within the jurisdiction of the bankruptcy court. *United States* v. *Pelzer*, 312 U. S. 399, 402, 403."
>
> (*Wragg* v. *Federal Land Bank of New Orleans*, 317 U. S. 325, at p. 328.)

In *Sola Electric Co.* v. *Jefferson Electric Co.*, 317 U. S. 173, the question was whether a patent licensee was estopped to challenge a price-fixing clause in the licensing agreement by showing that the patent was invalid. The case came to the federal court because of diversity of citizenship. The Circuit Court sustained the defense, without indicating whether it was applying the state or federal estoppel rule. This Court, in reversing, said at pages 175 and 176:

> "For here a different question is presented—whether the doctrine of estoppel as invoked below is so in

conflict with the Sherman Act's prohibition of price-fixing that this Court may resolve the question even though its conclusion be contrary to that of a state court.

"It is familiar doctrine that the prohibition of a federal statute may not be set at naught or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie Railroad* v. *Tompkins*, 304 U. S. 64. There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. *Royal Indemnity Co.* v. *United States*, 313 U. S. 289, 296; *Prudence Realization Corp.* v. *Geist*, 316 U. S. 89, 95; *Board of Com'rs of Jackson County* v. *United States*, 308 U. S. 343, 349, 350; Cf. *O'Brien* v. *Western Union Telegraph Co.*, 1 Cir., 113 F. 2d 539, 541. When a federal statute condemns an act as unlawful the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2; *Anotin* v. *Atlas Exchange Nat. Bank*, 295 U. S. 209; *Deitrick* v *Greaney*, 309 U. S. 190, 200, 201."

However, even the Court of Appeals has not made the claim that its rule is binding on the federal bankruptcy court. Its application of its own rule to the instant case came only after it had decided that by agreement of the parties the issue was reserved to it "unaffected by the reorganization consummated in the Federal court" (*Ferris* v. *Prudence Realization Corporation, supra*, at p. 218) (R. 246). If, as submitted by petitioner, the court was in error in so concluding, the ultimate decision here comes within the *Geist* case, and this Court will apply its own rule of distribution in bankruptcy.

POINT III

Upon equitable grounds petitioner's certificates are entitled to parity.

Beyond the mere assertion that the rule is an equitable one, neither the New York court nor respondents have justified subordination of an insolvent guarantor's certificates on equitable grounds. Equality in distribution is an integral part of bankruptcy administration. *Prudence Realization Corporation* v. *Geist*, *supra*; *Moore* v. *Bay*, 284 U. S. 4. The burden rests on those seeking subordination to show that the failure to grant them preference will work an injustice. *Sampsell* v. *Imperial Paper & Color Corporation*, 313 U. S. 215, 219.

In the present case petitioner is the guaranty creditors' realization corporation. Respondent certificate holders are guaranty creditors holding claims against the insolvent guarantor, sharing in the proceeds of the liquidation of the guarantor's estate together with all the other guaranty creditors. Petitioner submits here, as it did in the *Geist* case, *supra*, that the subordination of its certificates will prefer these creditors as against the remaining creditors, without justification or purpose.

In the *Geist* case, *supra*, this Court said at page 97:

> "The Prudence Company is not solvent. Its property is being liquidated in bankruptcy where all the claimants on its present and other guaranty obligations are entitled to share equally in its unpledged assets. Denial of the right to prove its claim, which is an asset in which all of Prudence's creditors are otherwise entitled to share, will serve only to divert this asset from all creditors to one class of creditors, the Zo-Gale certificate holders, and thus give to them the exclusive benefit of a security for which they have not bargained."

This Court there was referring to the bankruptcy of Prudence and the rights of its creditors *inter sese*. Unless

some action on the part of the remaining creditors caused damage to the Burnside guaranty holders, or the action of Prudence in repurchasing the certificates conferred a benefit exclusively on the remaining creditors or effected a hardship upon the Burnside guaranty holders, it would appear that not alone would parity not work an injustice upon respondents, but that subordination would grant an unwarranted and inequitable preference in their favor.

The stipulation entered into by the parties contains all the operative facts. The record here, including the deposition taken at the instance of respondents from their witness, shows that the certificates were acquired in the usual course of business by Prudence (R. 146, 169, 170); that the reacquired certificates were listed on Prudence's balance sheet as assets (R. 142); that in 1932 Prudence was faced with substantial maturities and applied for and received a loan of $20,000,000 from Reconstruction Finance Corporation (R. 154).

From the foregoing data respondents argue that Prudence was insolvent or imminently insolvent at the time of its acquisition of the certificates, that the reacquisition was to reduce its guaranty obligations and, apparently in an effort to come within some of the language in the *Geist* case, *supra*, at p. 96, respondents assert that such acquisition was an incident to Prudence's guaranty.

Nothing said thus far, however, relates to the rights of the guaranty creditors *inter sese*. Nor do the facts nor even the inferences indicate any inequitable conduct by the guarantor for the benefit of the remaining creditors at the expense of the Burnside guaranty holders. On the contrary, respondents' position is no more than an outright request for an unjustifiable preference. *Kelly* v. *Middlesex Title Guarantee and Trust Company*, 115 N. J. Eq. 592, aff'd on this opinion 116 N. J. Eq. 574; (1941) 55 Harv. L. Rev. 283, 285; (1941) 41 Yale L. J. 315, 318; (1942) 40 Mich. L. Rev. 739, 740.

If the actual or imminent insolvency of Prudence at the time of reacquisition is assumed, then certainly at that time its assets were held ratably for the benefit of all of its creditors. Prior to the acquisition of these certificates, Burnside creditors were entitled to no preference as against the remaining creditors. If Prudence then purchased some Burnside certificates with cash or other assets belonging to all creditors, the result of a parity determination will be solely to substitute the purchased certificates for the cash or other assets originally used to purchase them. Such substitution will result in the distribution of the proceeds of the certificates in the same manner as would have been invoked had there been no repurchase.

A subordination decree, however, changes the method of distribution by giving to the remaining Burnside guaranty creditors the benefit of all of the proceeds of the certificates, leaving the remaining creditors not alone without their pro rata portion of the original cash or assets used for the repurchase, but penalizes them by depriving them of their pro rata share of the proceeds of the substituted certificates.

If Prudence, through its brokerage account purchases, paid less than par, then the selling certificate holder was adversely affected, and all remaining creditors benefited. If Prudence paid par and this was more than the worth of the certificates, then the selling certificate holder was benefited and all the remaining creditors damaged. No matter what form the analysis takes, it is evident that the remaining Burnside certificate holders suffered no harm separate from the other creditors, and that such other creditors received no benefit not shared by these Burnside certificate holders.

As to the repurchase as an incident of Prudence's guaranty, the facts belie the argument. Prudence was under no obligation to pay principal for 18 months beyond the maturity of the certificates. Notice of the invocation of the so-called 18-months clause was given to the creditors

(R. 157). Under these circumstances, its practice in 1932 in attempting to secure reinvestment by its customers was consistent with its usual business policy of keeping customers, of doing business (R. 170).

An examination of this Court's opinion in the *Geist* case will demonstrate that the reference to the acquisition of securities as an incident of its guaranty was made by this Court in connection with the surety cases cited by the Court at page 96 of its opinion. In the present case, as was true in the *Geist* case, the rights claimed by petitioner in the certificated mortgage are not asserted by way of subrogation. The relationship between the guarantor here and certificate holders was not the customary suretyship relationship. The making of the mortgage loan was independent of the guaranty, which was given, not at the instance of the borrower, but by the guarantor after the making of the loan. Nor were the certificates or the mortgage here collateral security for the guaranty obligation. The certificates represented an undivided share in the mortgage and upon their acquisition by Prudence, Prudence became the holder of an interest in a mortgage. That was the precise question raised and determined in *In re The Westover, Inc.* (C. C. A. [2d] 1936), 82 F. (2d) 177. As the record discloses, such interests constituted a substantial portion of its assets, were its sale inventory, and were sold by the guarantor for profit. The manner of acquisition of certificates through a brokerage account at substantial discount was necessarily consistent with the purpose of the company in acquiring mortgage interests at less than par for future sale at a profit, and had the guarantor resold the specific certificates here involved, its purchaser would clearly have been entitled to parity.

It is submitted, however, that the discussion of the solvent surety cases by this Court in the *Geist* case and the reference to the acquisition of certificates by the guarantor as independent of its guaranty, were an incident of this Court's analysis of the equitable rules of distribution

of a bankrupt's assets. Respondents seek, not the protection of such rules, but their avoidance. Not alone have they failed to sustain the burden of showing that the refusal to grant the requested preference would work an injustice upon this single group of guaranty creditors, but they have demonstrated that subordination of the interests of the remaining guaranty creditors would violate the basic, equitable rule of pro rata distribution of an insolvent estate among creditors of the same class.

POINT IV

The judgment entered on the decision of the New York Court of Appeals is erroneous and should be reversed.

Respectfully submitted,

IRVING L. SCHANZER,
JAMES F. DEALY,
Counsel for Prudence Realization Corporation, petitioner.

Supreme Court of the United States

OCTOBER TERM 1944

No. 137

PRUDENCE REALIZATION CORPORATION, *Petitioner,*

vs.

JOSEPH W. FERRIS, GEORGE L. LONG and HENRY LEIFERT as Trustees under a Declaration of Trust dated as of July 1st, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, CITY BANK FARMERS TRUST COMPANY and MARTIN S. LINDGROVE as Trustees under the Last Will and Testament of Herman Stutzer, deceased, on behalf of themselves and other holders of certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, SOLOMON ZAUDERER, MILTON KIMMELMAN, IRVING ZAUDERER and CHARLES KIMMELMAN, doing business as KIMMELMAN AND ZAUDERER, on behalf of themselves and all other holders of Prudence Bonds Corporation participating certificate issue, and HUNTER L. DELATOUR, RAYMOND REISLER and JEROME THRALLS, Trustees of Realty Associates Securities Corporation, Debtor, holders of Burnside Certificates.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

REPLY BRIEF ON BEHALF OF PETITIONER, PRUDENCE REALIZATION CORPORATION

IRVING L. SCHANZER,
JAMES F. DEALY,
Counsel for Prudence Realization Corporation, Petitioner.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK

REPLY BRIEF ON BEHALF OF PETITIONER, PRUDENCE REALIZATION CORPORATION

I

As to the brief of respondents Ferris, Long and Leifert.

1. Respondents argue that despite the reservation in the plan, unless the bankruptcy proceedings accorded peti-

tioner parity by an express provision in the plan or in an order entered in the proceeding, the rights of the parties were wholly unaffected by the bankruptcy proceedings and were determinable under state law, as though there had been no bankruptcy reorganization at all. This position is untenable because upon the utilization of the Bankruptcy Act as the medium for distribution of the insolvent's assets to its creditors the rights of such creditors as among themselves became fixed and determinable in accordance with the provisions of *that* statute rather than any state system of distribution. So much was clearly decided in *Prudence Realization Corporation* v. *Geist*, 316 U. S. 89. Petitioner submits that a bankruptcy creditor's status remains determinable under the Bankruptcy Act unless, and to the extent that, a plan of reorganization modifies his right to such determination by provisions which conform to the requirement that the plan be fair, feasible and equitable. In the present case that right was not modified but merely reserved for future determination solely to avoid delay in consummating the plan (R. 16).

Even respondents admit that the bankruptcy court could have determined the status of petitioner's claim as a matter of bankruptcy law (Respondents' Brief, pp. 5, 6). As indicated in our main brief (p. 18), the only reasonable inference to be drawn from the reservation was that the question of status should be reserved for adjudication at a later time in any court having personal jurisdiction over the parties. It is highly unrealistic to argue that such a grant of concurrent jurisdiction to such a court constitutes an agreement by the guarantor to waive its right to have its claim determined in accordance with the Bankruptcy Act.

2. These respondents claim that petitioner has failed to mention a further distinction between the reservation in the *Geist* case and the reservation in this case which they contend is basic and material. The alleged material distinction is that the reservation in the *Geist* case was merely

part of the order confirming the plan, while here it was a formal, integral part of the plan, on the basis of which certificate holders consented to the plan. But the actual facts justify no distinction in law between the two cases. In the *Geist* case the order of confirmation, containing the reservation, was agreed upon and submitted by all parties in the form signed by the Court. Its language was substantially identical with that of the reservation here. However, in this case, in lieu of inserting the reservation directly in the order of confirmation, since there were a substantial number of amendments to be made to the plan relating to other matters, such amendments were drawn up separately, included as an exhibit, and approved by the Court in its order of confirmation (R. 118). In both cases, however, the reservation language was prefaced by the phrase "Anything in the plan to the contrary notwithstanding * * *" (R. 243). In the true sense, in each case the reservation was a "stop payment" order to the trustee; a direction that no distribution on the insolvent guarantor's certificates should be made under the existing provisions of the plans until the status of the insolvent guarantor's claim had been determined.

3. There is no basis for the assertion that petitioner's position is a collateral attack upon the Burnside plan. Petitioner does not question the validity of the plan nor of the order confirming it. It merely seeks a determination of the question reserved for determination in the plan. That is not an attack on the plan but its enforcement.

II

As to the brief of respondents City Bank Farmers Trust Company and Martin S. Lindgrove as trustees.

1. Counsel for these respondents appeared in the Prudence reorganization, the Zo-Gale reorganization (involved in the *Geist* case), and the other Amalgamated certificate

reorganizations. Accordingly, although they apparently suggest the contrary (pp. 6-8 of their brief), they should know that there was no material difference between the nature of the Zo-Gale and the Burnside reorganization proceedings which would render the *Geist* decision inapplicable. The plans of reorganization for the two certificate issues were promulgated in the Amalgamated proceeding before its severance from the Prudence proceeding (R. 93, 108). Upon the severance, while the caption was altered, there was no new filing of claims, nor any other step taken which directly or indirectly affected the rights of any parties as they existed theretofore. There is no justification for the statement on page 13 of their brief that the Prudence proceeding has been terminated—it has not been terminated by final order or otherwise.

2. In their brief under Point III respondents refer to the fact that the plan provided a method of distribution, in the event subordination was ultimately decreed, of the interest on the guarantor's certificates which had been segregated from the time of the guarantor's insolvency. They argue (Respondents' Brief, pp. 20, 21) that this provision constitutes an agreement between the parties: (1) that the question of participation was no longer determinable under the Bankruptcy Act; (2) that neither the insolvency of the guarantor nor the bankruptcy reorganization of the certificate issue should any longer have any effect upon the determination of the parity question; (3) that the determination of the question should be had under state law solely on the basis of the relations existing between the guarantor and the other certificate holders as such relations had existed immediately prior to and regardless of the bankruptcy and unaffected and unaltered thereby. This claim finds no support whatsoever in the record. A contention that the reservation in the *Geist* case had a similar effect was made by the trustee of the certificate issue in the *Geist* case. Certainly, no such agreement can possibly be implied from the mere

fact that the plan provided, in the event subordination should ultimately be decreed, for the distribution of the interest on the guarantor's certificates which had been segregated from the time of the guarantor's insolvency, in a manner *inconsistent* with the method of distribution applicable in the New York courts upon subordination. The reservation was intended solely to postpone adjudication of the status of the guarantor as a bankruptcy creditor, *i.e.*, whether the parity or the subordination provisions were to be applied.

The only difference between the present plan and the *Zo-Gale* plan is that here the parties agreed that if subordination was decreed the distribution should be in a specified manner, while in the *Zo-Gale* plan the parties, in lieu of specifying the method of distribution, agreed to such subordination provisions as the Court would insert upon a determination of a subordination status. In each case the adjudication of status, and therefore whether parity or subordination provisions for distribution were to be applied, was postponed. In the *Geist* case this Court held that the proper basis for such later adjudication was the Bankruptcy Act. That is the same basis to be applied here.

The attempt to exclude the effect of the bankruptcy of the guarantor because of the provisions of the guarantor's liquidation plan is similarly ineffective. Here again the rights of creditors to share in the liquidation were established under the Bankruptcy Act. The initial cash distribution under the plan was made in accordance with the bankruptcy rule of distribution (R. 47, 59). The New Loan Value Formula, rejected in New York reorganizations (*Matter of New York Title and Mortgage Co.*, 277 N. Y. 66), was an adjustment between guaranty creditors as a single group and general creditors. That is demonstrated by the classification of claims (R. 77). Moreover, the Prudence plan and order of confirmation upon which respondents rely for their argument were included in the *Geist* record (Case on Appeal, R. 63, 95), and the decision in that case is determinative here.

3. Under Point VI respondents argue for subordination on equitable grounds. For substance the argument is based upon a conclusion that petitioner's certificates were acquired by the guarantor to reduce its guaranty obligations and must be subordinated under the rule established by this Court in the case of solvent sureties (*United States* v. *National Surety Company*, 254 U. S. 73; *Jenkins* v. *National Surety Company*, 277 U. S. 258) which were distinguished in the *Geist* case at page 96.

An examination of the *Geist* decision shows, however, that this Court held the solvent surety cases inapplicable upon an analysis of the guaranty agreement and consideration of equities resulting from the insolvency of the guarantor. This Court stated the issue clearly at pages 95, 96:

> "But the question remains whether there is any equity arising from the Prudence Company's failure to perform its guaranty which a bankruptcy court should recognize as requiring the subordination of the company's interest in the mortgage to the claims of the other mortgage creditors."

That question was answered in favor of petitioner. The contract of guaranty is the same in the two cases; the guarantor's insolvency is a conceded fact, present in each case; and there is no valid reason advanced for overruling the *Geist* decision.

Respondents, however, disregard the basis of decision in the *Geist* case, and rely on the solvent surety cases in an effort to secure subordination. In that effort they ignore the nature of the guaranty, the character of Prudence's business, the actual manner of acquisition, and the effect of Prudence's insolvency.

The overwhelming proof is that the repurchase of the certificates here did not create special equities in favor of the Burnside guaranty creditors as against the other guaranty creditors, but rather; as decided in the *Geist* case, the facts support petitioner's claim that the equities require a parity determination.

Prudence was engaged primarily in the business of making mortgage loans. As the Circuit Court of Appeals said in *In the Matter of The Prudence Company, Inc.* (C. C. A. 2d, 1935), 79 F. (2d) 77 at page 80, speaking about Prudence, "Although a corporation organized under the Banking Law as an investment company has power to guarantee the mortgages and participation certificates which it sells, the element of insurance is but incidental to its mortgage business, * * *." It used its own funds to make loans secured by mortgages on real estate. At the time of making the loan it secured a "bonus" of approximately 5% from the borrower by actually advancing 95% of the face amount of the mortgage. *In re The Prudence Company, Inc.* (C. C. A. 2d, 1938), 98 F. (2d) 559, 560. As any other mortgagee, it secured an appraisal of the property (R. 37) as well as a title policy (R. 37). Thereafter, to secure additional funds for use in making further mortgage loans for profit, it created the certificate issues like the one here involved. It split up its mortgage into many parts and sold these parts of the mortgage to investors. To facilitate the sale it guaranteed to each purchaser of a portion of the mortgage the payment of principal within 18 months after the certificate matured and interest when due. Interest was guaranteed, not at the rate of 6% provided for in the mortgage, but at the rate of 5½% (R. 94). The differential of ½% was to compensate Prudence for servicing the mortgage, acting as transfer agent for the certificates, and for its guaranty. The differential was used to maintain Prudence's office and operating personnel. Its sale of certificates permitted it to realize upon the bonus received from the mortgagor and to use that money as well as the actual cash loaned.

The only basis upon which Prudence could continue in business for profit at any time was to maintain a group of investors in the mortgages which it received on making new loans. Its practice therefore at all times was to keep its customers, or "clients" as they were called (R. 144, 157, 170). Its practice before January, 1932, as well as after,

was at any time on application, to lend to holders of the certificates up to 90% on the security of the certificates, or to repurchase them at a 10% discount (R. 144). At or near the maturity of any issue it sent salesmen out to try to sell new issues in exchange for the maturing certificates (R. 167).

On January 1, 1932 the 18 months clause was invoked to postpone the principal guaranty obligation (R. 145). An amortization payment due on the Burnside mortgage on January 1, 1932 was not paid. The result was that with respect to certificates in the amount of such amortization which matured on that date the 18 months deferment began to operate. The remaining unmatured certificates did not become due until July 1, 1932, and the guaranty of principal of such certificates did not mature until 18 months thereafter, or January 1, 1934.

In February, 1932, Reconstruction Finance Corporation approved a loan of $20,000,000 for Prudence (R. 154). The securing of the loan was consistent with Prudence's continuance in business. Its practice with respect to repurchase of its own securities continued. Efforts to secure reinvestment by the client were made as usual, and the fact that there was a reinvestment did not mean that the client had first insisted on receiving his money (R. 167). Prudence's acquisition of certificates here did not differ from its acquisition of certificates of other issues; they were acquired as part of the regular practice of the company (R. 170).

When Prudence had originally sold the mortgage for 100%, after having paid only 95%, it made a profit. When it reacquired certificates at a 10% discount it made a further profit. When it reacquired it by selling a portion of another mortgage it was again realizing a profit on the new mortgage. That was its business.

Prudence was not a surety company. As indicated, its business for profit was not based upon receiving a premium for lending its credit, its profit to be gained when its liability on its guaranty did not mature. That was the busi-

ness of National Surety Company, involved in *United States* v. *National Surety Company* and *Jenkins* v. *National Surety Company, supra.* There the first connection between the surety and the assets of the primary obligor arose upon default by the obligor. There the surety's bond was required before the contractor could secure the contract or before the bank could receive the deposits. Here Prudence made an investment by lending money. The guaranty was subsequent in time and represented its contractual obligation to the purchasers of shares in that investment that the investment would be paid. As this Court said in the *Geist* case at pages 96, 97:

> "By that contract the guarantor pledged only its personal obligation for the payment of the certificates. It gave to the certificate holders no lien upon, or other priority in its interest in the mortgage more than to its other assets."

The purchaser of the certificate received not just a surety bond from Prudence but a share in a mortgage. That was a salable asset in his hands as well as in the hands of Prudence, with or without the guaranty. If the property was worth less than the mortgage and cost of acquisition, the deficiency was chargeable against the guarantor's assets; not against any special asset, but against the general assets based upon the unsecured guaranty contract. That was true of every guaranty contract of Prudence.

When Prudence became insolvent its general assets, including the certificates owned by it in this issue, became the source of payment of all of its guaranty claims. No guaranty creditor was entitled to any preferential treatment as against any other, and no property justifiably could be taken out of the general estate to transform the Burnside certificate holder's guaranty obligation into a secured debt merely because the insolvent guarantor having once sold its original investment had repurchased a portion of it. There is no doubt that if Prudence had again resold the reacquired certificates, with or without

the guaranty, the purchasers would have been entitled to parity and the cash received would have been part of the fund presently available to pay all of the insolvent guarantor's debts.

Petitioner, representing all of the insolvent's creditors, urges that there is no equity in subordinating the remaining creditors and in giving to the Burnside certificate holders "the exclusive benefit of a security for which they have not bargained" (*Prudence Realization Corporation* v. *Geist*, 316 U. S., at p. 97).

III

As to the brief of the Securities and Exchange Commission.

1. Under Point II of the Commission's brief it urges subordination as a matter of equity and practicality under federal law. To the extent that the argument proceeds upon the conclusion that reacquisition was solely as an incident of the guaranty, the discussion of the similar conclusion of respondents City Bank Farmers Trust Company, et al., under II of this brief is applicable here.

Whatever validity the balance of the Commission's argument would have if the solvent guarantor were claiming parity status, it is inapplicable here where parity is claimed, not by the solvent guarantor, but, after its insolvency, by the guarantor's creditors holding the same guaranty claims similarly in default.

On page 20 of its brief the Commission says (1) that if the guarantor had respected its guaranty obligation it would have made pro rata payments on account of its guaranty to the extent of available funds and there would have been no question of subrogation until the guaranty had been paid in full, and (2) that unless subordination is enforced the guaranty creditors will have been prejudiced by the failure to make such pro rata payments in the

attempt of the guarantor to escape full responsibility on its obligations.

This argument presupposes that only the Burnside Issue obligation matured, and that the 18 months' clause was invoked only in this case. The contrary, of course, was true (R. 145, 219). If pro rata payment had been made it would have been made not only to Burnside certificate holders but to over $22,000,000 of guaranty creditors in 1932 and to over $32,000,000 of guaranty creditors in 1933. Such a distribution would have accomplished what petitioner urges here: pro rata distribution of assets to all guaranty creditors, rather than preferential payments to Burnside guaranty creditors at the expense of the remaining similar guaranty creditors.

As previously indicated, the argument on pages 20, 21 and 22 of the Commission's brief does not deal with the facts in this case. The right of the solvent guarantor to share on a parity is not in issue here. Petitioner is not the guarantor but the creditors of the guarantor, who were all equally hurt or benefited by the guarantor's reacquisition of these certificates. Moreover, in the present case the certificate gave to the guarantor the right to hold certificates for its own account on a parity with other certificates (R. 32, 34).

On page 23 the Commission is disturbed by the possibility that holdings by the insolvent guarantor's estate may be utilized to the detriment of certificate holders in a particular issue. This is an assertion of a non-existent limitation upon a reorganization court's power and obligation to approve only a fair, feasible and equitable plan of reorganization. Particularly does this argument seem inapplicable since, under Chapter X reorganizations, the Commission itself participates in order to guard against any such overreaching.

The conclusion on pages 23 and 24 that subordination will facilitate the guarantor's reorganization is illusory. Even if subordinated, the guarantor's holdings are entitled to classification in the certificate issue reorganizations. The

insolvent guarantor's trustees are under obligation to participate to make certain that appraisals of the underlying property are proper and that the provisions relating to their holdings are fair. The suggestion that certificate holders then will be less interested in realizing upon their claim against the guarantor's estate is not persuasive. It is to be doubted as a matter of practical experience that where an estate exists, creditors having a right to participate will neglect to file and prosecute their claim. Moreover, certainly this Court will not approve a procedure which will discourage the filing of a valid and enforceable claim, thereby preferring the remaining creditors.

As indicated, any considerations of practical administration which possibly may have had influence upon the New York courts in their reorganizations are not present here. The Commission overlooks the fact that in the state court reorganizations the guaranty creditor is a secured creditor of the guarantor. *Matter of New York Title and Mortgage Company*, 160 Misc. 67, reversed on other grounds, 277 N. Y. 66. In bankruptcy they are not secured creditors, but general creditors for the full amount guaranteed without reduction of the value of the guaranteed security. (*Ivanhoe Bldg. & Loan Assn.* v. *Orr*, 295 U. S. 243). Practical considerations present in the case of state court reorganizations under such circumstances cannot obtain under the present Bankruptcy Act.

In its final argument, dealing with claims of general creditors, the Commission urges that general creditors must be held to have loaned money subject to equities of subordination. As indicated, however, the guaranty creditors are general creditors too. They received the same contract of guaranty as was given to the Burnside guaranty creditor. The problem, therefore, remains as to the equities presently existing between such guaranty general creditors as such rights presently exist after their certificate issue reorganizations have been completed and as established by the *Geist* case, not what they would be *in futuro* if the present views of the Commission were adopted now for the first time.

It is suggested that the procedure outlined by the Commission in the case of Prudence would not have facilitated the guarantor's reorganization but by treating each issue independently would have required separate classification for each group of certificate holders, requiring separate consents, and would have rendered reorganization virtually impossible.

CONCLUSION

The judgment entered in the Supreme Court of the State of New York, County of New York, upon the decision of the New York Court of Appeals, is erroneous and should be reversed.

Respectfully submitted,

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Petitioner.

December, 1944.

FILE COPY

JUL 18 1944
CHARLES ELMORE CROPLEY

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 137.

PRUDENCE REALIZATION CORPORATION,
Petitioner,

—v.—

JOSEPH W. FERRIS, GEORGE L. LONG and HENRY LEIFERT as Trustees under a Declaration of Trust dated as of July 1st, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, CITY BANK FARMERS TRUST COMPANY and MARTIN S. LINDGROVE as Trustees under the Last Will and Testament of HERMAN STUTZER, deceased, on behalf of themselves and other holders of certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, SOLOMON ZAUDERER, MILTON KIMMELMAN, IRVING ZAUDERER and CHARLES KIMMELMAN, doing business as KIMMELMAN AND ZAUDERER, on behalf of themselves and all other holders of Prudence Bonds Corporation participating certificate issue, and HUNTER L. DELATOUR, RAYMOND REISLER and JEROME THRALLS, Trustees of REALTY ASSOCIATES SECURITIES CORPORATION, debtor, holders of Burnside Certificates,
Respondents.

BRIEF FOR RESPONDENTS JOSEPH W. FERRIS, HENRY LEIFERT AND GEORGE L. LONG AS TRUSTEES UNDER A DECLARATION OF TRUST DATED AS OF JULY 1, 1938, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Respondents.

BRIEF FOR RESPONDENTS JOSEPH W. FERRIS, HENRY LEIFERT AND GEORGE L. LONG AS TRUSTEES UNDER A DECLARATION OF TRUST DATED AS OF JULY 1, 1938, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

THE OPINIONS OF THE COURTS BELOW.

The opinion in the Supreme Court is unreported (R. 322).

The opinion in the Appellate Division is reported at 266 App. Div. 543 (R. 340).

The opinion in the Court of Appeals is reported at 292 N. Y. 210 (R. 359).

II.

STATEMENT.

The petitioner has filed a petition for writ of certiorari to review the judgment and order of the Court of Appeals of the State of New York, and the judgment entered in the office of the Clerk of the Supreme Court of the State of New York, County of New York thereon. The action is one by your respondents for a declaratory judgment declaring the rights of the petitioner and other certificate holders in a mortgage on real property covering premises 307 W. 36th Street in the City, County and State of New York, which mortgage is referred to as the Burnside mortgage.

III.

WHAT THE COURT OF APPEALS DECIDED.

The New York Court of Appeals unanimously held that the certificates held by the petitioner are subordinate to those held by others in an opinion printed on page 359 of the record, and reported at 292 N. Y. 210. It decided:

First: That the Burnside Plan of Reorganization did not define or determine the rights of the parties nor were such rights determined by the Bankruptcy Court in the course of its administration or in connection with the distribution of any of the assets of either Prudence or Amalgamated;

Second: That where neither a Plan of Reorganization nor any order in the proceedings undertakes to modify the legal rights of the parties, that such rights remain as they were before the institution of the bankruptcy proceeding.

We quote from the opinion of the Court of Appeals as follows, page 336 of the Record (292 N. Y. 210, at page 218):

> "Upon this record it appears without contradiction that the Burnside plan of reorganization did not attempt to define or determine the relative rights of Realization Corporation as the holder of certificates acquired by Prudence and of other holders of Burnside certificates, nor was any determination of these rights made in the Bankruptcy Court in the course of its administration or in connection with the distribution of any of the assets either of Prudence or of Amalgamated. The controversy, therefore, was brought to the State courts, as contemplated by the plan of reorganization for determination of these relative rights unaffected by the reorganization consummated in the Federal court.
>
> "Corporate reorganization in the Federal courts is a process of adjustment and modification of legal rights frequently involving the impairment of contractual obligations under plans predicated upon the consent of security holders and creditors and upon the court's approval of the plan as fair and equitable and therefore binding upon the minority. If neither the plan nor any order in the proceeding undertakes to modify the legal rights but leaves those rights to be determined by courts of competent jurisdiction, such courts have no power to impair the legal or equitable rights of the parties. The court below erroneously regarded the *Geist* case as establishing a rule. It was only effective in determining a question affecting the administration and distribution of assets in the particular reorganization before the court. To conclude that our decision is ruled by the decision of the Supreme Court in the *Geist* case, we should have to modify the Burnside plan of reorganization, which did not undertake to determine, define or modify the relative rights of certificate holders under the Burnside mortgage."

IV.

QUESTIONS STATED TO BE PRESENTED.

In substance, the petitioner claims that the question presented is whether the State court disregarded provisions of the Bankruptcy Act and the decisions of this Court in determining the issues presented.

ARGUMENT.

POINT A.

NO FEDERAL QUESTION OF SUBSTANCE IS PRESENTED.

No claim is made in this case by the petitioner that the Plan of Reorganization of either Burnside or Prudence, nor any order in either proceeding accorded the petitioner parity. That, as stated by the Court of Appeals, appears without contradiction. What petitioner urges in effect is, that because this Court in a similar proceeding, *Prudence Realization Corporation* v. *Geist*, 316 U. S. 89, accorded it parity, it is entitled to parity here as well. This contention is entirely without substance.

Let us briefly examine the facts. The Prudence Company, Inc., the predecessor in title of petitioner, issued mortgage participation certificates, which it guaranteed, to various certificate holders. The mortgage originally in the sum of $1,200,000 had been reduced to $1,016,000 (R. 248, 249). The petitioner holds $431,212.86 in certificates (R. 249). The bond and mortgage by its terms became due on July 1, 1932 and all certificates matured on that day (R. 130). The previous owner of the premises had defaulted in an installment of principal due January, 1932, and Prudence had caused the property to be acquired by its subsidiary Amalgamated Properties, Inc. in June, 1932 (R. 20, 130). Under the terms of the guarantee, Prudence had eighteen months from July 1, 1932 to make payments of principal (R. 51).

On February 1, 1935, The Prudence Company, Inc. filed its petition in the Bankruptcy Court. On March 16, 1936, Amalgamated Properties, Inc. as owners of the property filed a petition for reorganization as part of the then pending reorganization of The Prudence Company, Inc. (R. 181). Thereafter, and on April 22, 1938, an order was made severing the proceedings and the proceedings of Amalgamated Properties, Inc. thereafter continued separate and apart from that of The Prudence Company, Inc. (R. 321).

Had the question of the relative rights of Prudence and other certificate holders in the mortgage been presented prior to the filing of any bankruptcy proceedings, there is no question but that a determination of the question of parity would have been made according to the law of the State of New York. The rule would have been the same whether the action was in a State or Federal Court, for it is in the State of New York that the land is situated, and the bond and mortgage, the participation certificates and the agreement of guarantee were made and delivered. Had such a determination been made at that time, this Court would have no concern with the decision whatever it was. The issues involved would be purely of State law and by no stretch of the imagination could any Federal question be involved. What the Court of Appeals held here, was that the Bankruptcy Court did not determine, define or modify the rights of certificate holders either by the plan or reorganization or by any order and hence that the rights of certificate holders are what they were before the filing of the petition and are unaffected by the bankruptcy proceeding. This statement of law is unassailable.

The filing of a petition in bankruptcy does not of itself alter the existing rights of parties. A trustee in bankruptcy has no better title than that which the bankrupt had.

Hewit v. *Berlin Machine Works*, 194 U. S. 296;
Security Warehousing Co. v. *Hand*, 206 U. S. 415.

In the case of *Security Warehousing Co.* v. *Hand*, this Court said at page 423:

> "It is no new doctrine that the assignee or trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands, unless otherwise provided in the Bankruptcy Act, is subject to all of the equities impressed upon it in the hands of the bankrupt."

No provision of bankruptcy law has been pointed out and none can be pointed out which provides that a right of priority in property of a creditor is lost through the mere institution of a proceeding in bankruptcy.

It is not necessary in this case to determine how far the Bankruptcy Court may go in disregarding rights claimed under State law. We shall assume for the purposes of this argument that the Bankruptcy Court could have deprived certificate holders of their superior rights under the State law, but it did not do so. Neither in the Plan of Reorganization of Burnside nor of Prudence was any determination made of the relative rights of Prudence and others in Burnside certificates. That fact is undisputed. The Plan of Reorganization relating to Burnside did no more than to recognize that a question had arisen as to the relative rights of the parties and reserved decision of that issue for determination by a Court of competent jurisdiction. This provision was part of the plan as amended (R. 175). The Prudence plan did no more than to recognize the existence of an undetermined parity issue (R. 84).

The main argument of the petitioner here is based upon a similarity of the reservation of decision of the parity question in this case with language used in a similar reservation in the *Geist* case. It should be noted, however, that the reservation in this case was part and parcel of the Plan of Reorganization, whereas the reservation in the *Geist* case was only contained in the order of confirmation.

Petitioner argues that the two reservations mean the same, and what they actually mean is that the question is reserved

for decision by a court of competent jurisdiction, but then only in accordance with bankruptcy rules of distribution. This statement is wholly unsupported by anything in the record, as is petitioner's statement that the only purpose of reserving the decision was to avoid delay.

The plan as originally promulgated provided for parity of all certificates. The amended plan says that a question has arisen as to the relative rights of the parties. That question was whether or not other certificate holders enjoyed superiority over Prudence, the guarantor. Unless they claimed that superiority under State law, no question would have arisen. No one claimed that the Bankruptcy Act subordinated Prudence. If it were thought that the question involved was whether there were any rights of priority under the bankruptcy law, why did not the Bankruptcy Court retain exclusive jurisdiction to determine the question? The question here was a very important one. Out of a total of $1,016,000 worth of certificates, a claim was made that $431,[illegible]12.86 was subordinate. It is inconceivable that the Court in its desire for haste would leave so vital a question open, unless it was intended that the decision to be made was one involving State law more properly determinable by a State court. The parties have by a practical construction interpreted the plan as requiring decision by a State court under State law. The petitioner here at no time sought an adjudication in the bankruptcy proceeding. It was as free as the respondent to seek an adjudication of the issue. Its failure to seek that adjudication in the Bankruptcy Court indicates clearly its interpretation of the meaning of the reservation. The reservation of the question for a decision by a court of competent jurisdiction meant a State court and could mean nothing else. Bankruptcy Courts do not refer to State courts' questions involving bankruptcy law. While proceedings are pending, the bankruptcy's jurisdiction of all questions is exclusive. However, the Bankruptcy Court can and often does consent that the interest of parties in property within the

jurisdiction of the Bankruptcy Court be adjudicated by a State court either because of convenience or what is thought to be unsettled State law.

Sherman v. *Buckley*, 119 F. 2, 280;
Foust v. *Munson S.S. Lines*, 299 U. S. 77;
Thompson v. *Magnolia Co.*, 309 U. S. 478.

If the Bankruptcy Court thought the question was one of bankruptcy distribution, it could have decided the question either before or after the confirmation of the plan so long as jurisdiction was retained. The only reason for giving jurisdiction to a State court is so that the rights of the parties would not "by the accident of federal jurisdiction—been determined contrary to the law of the state which in such matters is supreme." *Thompson* v. *Magnolia Co., supra* (309 U. S. 478, p. 483).

We are fortified in this view by the fact that the rights of the parties are not left solely to determination by the Court. The provision containing the reservation provides that in the event Prudence certificates are subordinate, that one-half the interest which would have gone to Prudence shall be paid as interest, and the other half put into the sinking fund for the retirement of certificates (R. 175, 176). This is an agreement by the parties to treat Prudence more favorably than it would be entitled to be treated if it were in fact subordinate, because in that event, it would not be entitled to have part of the interest moneys used to retire certificates.

The *Geist* case is not the same as the one here. There, the trustee commenced a proceeding while the bankruptcy proceedings were still alive, by an application in the Bankruptcy Court for a determination of the issue, and the Court reserved full and complete jurisdiction over that application at all times. Whatever the parties may have intended by the reservation, there is no question but that the Bankruptcy Court, while proceedings are still open, have full control over the plan and may modify and change it. This Court in its consideration of the *Geist* case treated the question presented as one of distribution in a bankruptcy proceeding. In

its language, it mentions the requirement of the Bankruptcy Act, that a Plan of Reorganization must be one which "is fair and equitable and does not discriminate unfairly in the case of any class or creditors", and that "dividends of any equal percent" shall be made "in all allowed claims except such as have priority or are secured". It talks about "the claim of Prudence" and of the impropriety of the "denial of the right to prove its claim". It states "allowance of The Prudence Company's claim does not involve any breach of its debts as guarantor". It treats the question purely as if presented on the propriety of approving a plan of reorganization and determined that such a plan cannot be approved unless parity is accorded Prudence. What this Court decided in the *Geist* case is succinctly and accurately stated in the headnote of the official report. It is in substance, that an insolvent defaulting guarantor of mortgage participation certificates is entitled to share *pro rata* in the distribution of the proceeds of the mortgage in a 77B reorganization proceeding; that the New York rule that the guarantor impliedly agrees to subordinate his own claim, is taken as a rule of State law governing State liquidation and is not applicable to bankruptcy proceedings; and lastly, that the Bankruptcy Act prescribes its own criteria for distribution to creditors.

The petitioner urges that the rule enunciated in the *Geist* case must be read into the Burnside Plan of Reorganization. In effect, what he says is that if it had been urged before the confirmation of the plan, that the plan would not be fair and equitable unless Prudence were accorded parity, then, parity would be ordered, and therefore we must assume that parity was accorded. This flies in the face of the fact that the plan actually was silent on the question of parity and does not more than say that the issue exists. Petitioner seeks to write into the plan a provision not there contained. It seeks to give this Court, in a collateral proceeding, the right to review the provisions of the plan in the light not of what has actually been done, but what petitioner says should have been done. If such a course is to be permitted, no plan of reorganization will be free from the possible attack that its provi-

sions are not fair and equitable, and in accordance with bankruptcy rules of distribution, and it will destroy the binding force of the doctrine of *res adjudicata* and open endless avenues for attacking reorganization plans.

A plan as confirmed, is not open to collateral attack. An order confirming a plan of reorganization is *res adjudicata*.

Chicot County Drainage District v. *Baxter State Bank*, 308 U. S. 371.

The *Chicot County* case was a suit on a bond issued by the Chicot County Drainage District which had been reorganized under the Municipal Debt Readjustments Act of 1934. The act under which the petitioner had been reorganized was subsequently declared to be unconstitutional by the Supreme Court of the United States. Nevertheless, this Court held that the decree approving the plan was *res adjudicata* and that it could not be collaterally attacked. There, this Court said at page 378:

> "The remaining question is simply whether respondents, having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding 'but also as respects any other available matter which might have been presented to that end.'"

The purpose of reorganization is to permit an insolvent concern to carry on. To this end, the act permits the modification and alteration of the rights of creditors. The manner and degree in which the rights of creditors are affected is determined by a plan approved by the requisite number of creditors affected by it and confirmed by the Court. Creditors whose rights are said not to be materially and adversely affected by the plan, need not approve (Section 77B, subdivision b). It is the plan when approved and confirmed

which determines the rights of creditors. All plans of reorganization are not alike. The two plans of reorganization involved in these proceedings, namely, the plan of reorganization involved in the Burnside issue and that involving Prudence, itself, are different. They are by necessity different because the problems involved in each reorganization are different. The Prudence plan and its order of confirmation occupies sixty-two pages in the Record on Appeal (from page 64 to page 126); the plan of reorganization and order of confirmation of the Burnside issue occupies forty-three pages on the Record on Appeal (from page 135 to page 177).

It is to the plans and orders of the Bankruptcy Court to which we must look in order to determine the manner and extent of the modification or change in the rights of parties. After confirmation, the plain language of the plan is controlling, and here, it is plain that the parties intended that their rights should be what they were before the proceedings were instituted.

CONCLUSION.

The Court of Appeals of the State of New York has not denied to the petitioner the benefit of any Federal statutes. The decision here is in accord with the provisions of the plan and the Bankruptcy Law. The petition for certiorari should be denied.

Respectfully submitted,

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Petitioner,

—v.—

JOSEPH W. FERRIS, GEORGE L. LONG and HENRY LEIFERT as Trustees under a Declaration of Trust dated as of July 1st, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, CITY BANK FARMERS TRUST COMPANY and MARTIN S. LINDGROVE as Trustees under the Last Will and Testament of HERMAN STUTZER, deceased, on behalf of themselves and other holders of certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, SOLOMON ZAUDERER, MILTON KIMMELMAN, IRVING ZAUDERER and CHARLES KIMMELMAN, doing business as KIMMELMAN AND ZAUDERER, on behalf of themselves and all other holders of Prudence Bonds Corporation participating certificate issue, and HUNTER L. DELATOUR, RAYMOND REISLER and JEROME THRALLS, Trustees of REALTY ASSOCIATES SECURITIES CORPORATION, debtor, holders of Burnside Certificates,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS CITY BANK FARMERS TRUST COMPANY AND MARTIN S. LINDGROVE, AS TRUSTEES, ETC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK.

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Trust Company and Martin S. Lindgrove,
as Trustees, etc., Respondents.

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 137.

PRUDENCE REALIZATION CORPORATION,
Petitioner,

—v.—

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OPINIONS BELOW.

The opinion of the Supreme Court, New York County, Additional Special Term, appears at R. 322-323.

The opinion of the Appellate Division, First Department, appears at R. 340-343, and is reported in 266 App. Div. 543.

The opinion of the Court of Appeals of the State of New York appears at R. 359-375, and is reported in 292 N. Y. 240.

STATEMENT OF THE CASE.

On June 25th, 1927, The Prudence Company, Inc., the owner of a bond and mortgage in the principal sum of $1,200,000.00, made by Burnside Improvement Co., assigned them without consideration to a wholly controlled affiliate, Prudence-Bonds Corporation, pursuant to an arrangement whereby the latter was to issue certificates participating therein.

As a part of this arrangement, Prudence-Bonds Corporation assigned the bond and mortgage to The Bank of America as depositary, pursuant to a deposit agreement entered into between them at the same time (R. 28-47). The Prudence Company, Inc., then executed an instrument guaranteeing to the holders of the certificates to be issued the payment of interest thereon when due, and of the principal thereof when due or within eighteen months thereafter (Exhibit C, R. 53-58).

Certificates were thereafter issued and are outstanding in the hands of various persons, to the extent of $1,016,000.00. The holders of such certificates became tenants in common of the bond and mortgage (R. 19; Exhibit B, R. 48-53. *In re The Westover, Inc.*, 82 F. 2d 177; C. C. A. (2) 1936).

The mortgage and the certificates matured, by their terms, on July 1, 1932 (R. 213), but the mortgagor defaulted in the payment of an installment of principal due January, 1932. After such default, certificates aggregating $431,212.86

in principal amount were reacquired, as hereinafter stated, by The Prudence Company, Inc., the defaulting guarantor, and are now held by its successor, the petitioner Prudence Realization Corporation.

The first reorganization proceeding involved herein is that of The Prudence Company, Inc. (hereinafter called the "guarantor"). On March 4, 1933, the guarantor was taken over by the Superintendent of Banks of the State of New York. On February 1, 1935, it filed its petition in the United States District Court for the Eastern District of New York, asking for reorganization under Section 77-B of the Bankruptcy Act. The Court approved the petition on the same day, consolidated it with an involuntary proceeding against the guarantor theretofore commenced, appointed trustees, and later adjudicated the guarantor insolvent (R. 24). Thereafter a Plan for its reorganization was confirmed by the District Court (R. 64-102).

The effect of the Plan was to transfer to petitioner for liquidation all assets of the defaulting guarantor (R. 24-25), including the reacquired Burnside certificates. The holders of Prudence-guaranteed securities had filed claims against the guarantor, based on the default in the guaranty. In bankruptcy *simpliciter*, as distinguished from corporate reorganization in the Bankruptcy Court, such claims would have been unsecured claims allowable to the full extent thereof, *i.e.*, the face value of the certificates and interest thereon. See *Ivanhoe Building & Loan Association* v. *Orr*, 295 U. S. 243. The guarantor's Plan, however, changed this, treated the guaranty claims as secured by "Collateral," (R. 70-71), and reduced them by the "New Loan Value" of the mortgaged property underlying the certificates to which the guaranty attached (R. 73-74; 85). Claimants participated in the Plan only to the extent of the reduced amount. The "New Loan Value" of such property or "Collateral" was fixed by a formula in the Plan (R. 95-99).

Thus, distribution by the petitioner of amounts realized by it on the assets of the bankrupt guarantor was to be made in accordance with the agreement incorporated in the Plan,

rather than in accordance with the Bankruptcy Law. This agreement treated the guaranty holders as secured creditors (R. 84-88) and approximated the method adopted in the reorganization of mortgage and guarantee companies in the Courts of the State of New York. N. Y. Insurance Law, § 544 (6). Nothing in the Plan, or in the order confirming it, fixed or adjudicated the value or priority of lien of the assets transferred to petitioner.

The Plan recognized that the question of parity existed and that if the reacquired certificates were subordinated, their value as an asset would be less. The Plan accordingly provided that if there should be

> "uncertainty whether certificates of such issue held by the Debtor's estate on the Effective Date are on a parity with other certificates of such issue, the deduction to be made pursuant to the foregoing clause (1) shall be based in the first instance on the assumption that the certificates so held in the Debtor's estate are not entitled to parity, and an appropriate reserve shall be established by the New Company to provide for the additional distribution to be made to certificate holders of such issue if the Board of Directors shall be later satisfied that such parity exists; the Board of Directors being authorized to discontinue such reserve if and when satisfied that such parity does not exist; * * *" (R. 86).

"Debtor" in the above quotation means the guarantor; "New Company" means the present petitioner, Prudence Realization Corporation.

The Plan also recognized that certificate holders had dealt or would deal with their certificates and the underlying mortgages in separate reorganizations thereof. In order, to anticipate and prevent the argument that such dealings might constitute a waiver of claims, such as the claim to subordinate the guarantor's reacquired certificates, the certificate holders required the guarantor's plan to provide that unless a guarantee claim should have been expressly withdrawn, released, compromised or expunged,

> "no action taken subsequent to February 1, 1935, by or on behalf of any holder of a guarantee claim against the Debtor with respect to his Collateral shall bar any such claimant from participating in the benefits of the Plan to the extent herein provided" (R. 95).

"Collateral" means the mortgage underlying the certificates; February 1, 1935 is the date of the approval of the guarantor's petition for reorganization.

The District Court's order confirming the guarantor's Plan recognized the existence of equities in favor of third persons, and preserved such equities as follows (R. 119):

> "The Section 77-B Trustee of the Debtor is hereby further directed to transfer to the New Company forthwith, subject to all then existing equities and rights of third parties therein, all assets held by said Section 77-B Trustee for the account of others, or held by said Section 77-B Trustee in any agency or other segregated account pending settlement or determination of equities or rights asserted by others."

The "New Company" above referred to is the petitioner herein.

The second reorganization involved herein is that of Amalgamated Properties, Inc., a wholly owned subsidiary of the guarantor, used by it to take title to properties subject to defaulted mortgages in which certificates had been issued. In this way Amalgamated Properties, Inc., had obtained title to the property subject to the Burnside certificates.

On March 16, 1936, Amalgamated Properties, Inc., filed its petition for reorganization in the same District Court as a part of the reorganization of the guarantor, under the procedure then permitted by Section 77-B of the Bankruptcy Act (R. 181). Later this proceeding was severed from the reorganization proceeding of the guarantor, and the two reorganizations were thereafter conducted independently (Stipulation, par. 4, R. 321).

In the Amalgamated reorganization, the practice was to propose a separate Plan for each certificate issue (R. 181-

182). A separate Plan was thus proposed for the Burnside certificates and ultimately confirmed (R. 135-177). This Plan provided that the Burnside mortgage be assigned to Trustees and then extended and modified, and that the mortgaged property be transferred to the same Trustees without merger of the mortgage and fee. Such assignment and transfer were made, and Ferris, Long and Leifert, respondents herein, are now such Trustees, with all the rights of an owner of the mortgage (R. 142, 145). The certificates were modified to conform to the Plan, and the rights of the holders thereof were changed from those of tenants in common of the mortgage, to those of beneficiaries of a trust (Section 1, Part VI of the Plan, R. 148).

The guarantor filed a claim in the Amalgamated reorganization, based on its holding of the Burnside certificates reacquired by it. Objection was made that the guarantor, having defaulted, might not participate in the mortgage on a parity with the other holders of certificates whose claims it had guaranteed and not paid. The Burnside Plan provided that this question should be reserved for future determination, and that no interest should be paid on the Burnside certificates held by the guarantor,

> "• • • unless and until it shall have been finally adjudicated by a Court of competent jurisdiction whether or not The Prudence Company, Inc., or its Trustees, or their successors or assigns, are entitled to receive such cash or other property or securities and to share in the proceeds of the property to be assigned to the Trustee pursuant to the Plan and on a parity with other certificate holders or otherwise" (R. 175).

Pending such adjudication, the respondents-trustees are to hold in escrow the interest otherwise payable on the so-called "Prudence-owned Certificates." If the adjudication should be to the effect that such certificates are subordinate, then one-half of the interest otherwise payable thereon is to be paid into a sinking fund for the retirement of certificates, and the other half is to be distributed as additional interest on the publicly-held certificates (R. 175-176).

These provisions of the Plan constitute, as a matter of agreement, a complete disposition of the money allocable to the guarantor's certificates.

The Burnside Plan contained two other reservations. These were (1) an express reservation of all rights of action against the guarantor (R. 141), and (2) the following in Part IX, paragraph 5 (R. 154):

> "* * * the certificate-holders hereby expressly reserve any and all rights which they may have against said guarantor or guarantors by reason of any breach of any such guaranty or guaranties."

The Plan of Reorganization for the Burnside certificate issue was duly accepted in writing by the 77-B Trustees of the guarantor as prescribed by the Bankruptcy Act (Stipulation, par. 3, R. 320). Thus, the guarantor expressly became a party to the agreement and accepted its benefits in lieu of its distributive rights under the bankruptcy law. Petitioner is merely the successor of the guarantor, being, in effect, no more than a transferee of the assets at a bankruptcy sale.

The Burnside Plan as amended was duly confirmed on June 14, 1938, and is now in effect (R. 156-177).

Both reorganization proceedings have been terminated by appropriate final orders in each proceeding, and none of the present parties is or ever has been in bankruptcy (R. 189, 365).

Since respondents claim that the defaulting guarantor acquired the certificates (for which petitioner is now seeking parity), in connection with its guarantee and as a method of reducing that obligation *pro tanto*, the financial condition of the guarantor is important. During 1931, the year preceding the maturity of the certificates and of the mortgage, the cash position of the guarantor had deteriorated from approximately $3,500,000.00 as at June 30, 1931, to only $783,738.08 as at December 31, 1931. Its other assets, as at the latter date, consisted of marketable securities amounting to $168,045.25 and notes and accounts receivable amounting to $1,563,459.63. The balance of its assets were either pledged assets or the guarantor's own securities or those of affiliated companies (Stipulation, par. 1, R. 320).

Liabilities of the guarantor during 1932 on maturing mortgage securities guaranteed by it aggregated $22,791,433.00, or an increase of $21,816,333 over the comparatively small total of maturities of $875,100.00 for 1931. In view of the increasing defaults by mortgagors, the guarantor's assets were insufficient to pay the increasing maturities of mortgage securities guaranteed by it. The following table shows the pyramiding of maturities of obligations guaranteed by The Prudence Company, Inc., for the eleven years from 1927 to 1937:

1927	$ 100
1928	1,000
1929	2,600
1930	2,400
1931	875,100
1932	22,791,433
1933	32,488,177
1934	40,162,715
1935	26,230,120
1936	16,096,161
1937	10,676,186

Since the mortgages were no longer worth their face value, the guarantor was threatened with complete collapse. The directors took three moves in an attempt to avert this:

1. In November of 1931, they asked Reconstruction Finance Corporation for a loan of $25,000,000. (R. 320), which was granted in February of 1932, to the extent of $20,000,000. (R. 222-223). This loan was necessary for the guarantor "to keep on as a going concern" (R. 223). In its application for the loan, the guarantor stated that $12,000,000. thereof would be used "to renew maturing mortgages," since the mortgages, if foreclosed, would not bring in enough to pay off the loan:

> "• • • If we fail to renew selected maturing mortgages which we have guaranteed, the flood of foreclosure actions will necessarily result • • • in loss to investors in first mortgage securities, since their properties, when foreclosed, will bring only a fraction of the amount originally conservatively loaned thereon."

2. The guarantor invoked the eighteen months grace clause in its guaranty, and on January 1, 1932, notified the certificate holders that it had suspended principal payments (R. 211). At the same time the mortgagor defaulted in the payment of an instalment of principal due on the Burnside mortgage in January of 1932. Thus the mortgage was in default, although the default could not be enforced against the guarantor because of the grace clause. On June 13, 1932, the guarantor caused title to the mortgaged premises to be taken by its wholly owned subsidiary, Amalgamated Properties, Inc., which later executed an assignment of rents to the guarantor (R. 228-229).

3. The guarantor began acquiring Burnside certificates by purchasing them at a discount or by having the owners exchange them for certificates of other issues not in default and of later maturities. These acquisitions took place between March 3, 1932 and January 23, 1933 (Exhibit D, R. 59-63). The methods of acquisition will be discussed later, but prior to January 1, 1932 the guarantor had not owned any Burnside certificates (Stipulation, par. 6, R. 321).

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ARGUMENT.

POINT I.

NO BANKRUPTCY QUESTION OR OTHER FEDERAL QUESTION IS INVOLVED.

The land subject to the mortgage is located in the State of New York. The bond and mortgage were executed in New York. The deposit agreement, the agreement of guaranty, and the certificates themselves were made, executed and delivered in New York. The guarantor acquired the certificates for which it now claims parity, in New York prior to the bankruptcy but after defaults. Its last purchase of Burnside certificates was on January 23, 1933; the bankruptcy did not occur until February 1, 1935. Thus, before the Bankruptcy Act could apply, or any other Federal jurisdiction attach, the relations existing among the certificate-holders of the Burnside issue and the guarantor had become fixed as a matter of state law. No law other than the law of the State of New York was applicable. If the certificates reacquired by the guarantor had become subordinate, *i.e.*, had become in effect junior in lien, that result had taken place long prior to the filing of the petition by the guarantor. The only right of the petitioner is as a transferee of those assets at a bankruptcy sale, with no greater rights than the bankrupt transferor, and that transfer, by the very order directing it, was subject to "all then existing equities and rights of third parties" (R. 119).

The reservations in the Burnside Plan (R. 175; 141; 154), extending expressly to "successors or assigns" of the guarantor (R. 175), and closely correlated with the reservations in the guarantor's Plan (R. 86; 95; 119), make it clear that nothing in either bankruptcy proceeding or in either Plan, purported to adjudicate or determine either the relative rights in the property held for the satisfaction of the mortgage, or the value or priority of lien of the certificates reacquired by the guarantor. Such relative rights and prior-

ities were, therefore, unaffected by the Reorganization Plans. Since the question of parity remained undecided at the time of the confirmation of the Plans, the "court of competent jurisdiction," referred to in the reservations, was required to determine the rights as of a time immediately preceding the filing of the petition, when those rights had become fixed as a matter of state law. This was the view adopted by the Court of Appeals of the State of New York, which, speaking through Thacher, J., said:

> "Upon this record it appears without contradiction that the Burnside Plan of Reorganization did not attempt to define or determine the relative rights of Realization Corporation as the holder of certificates acquired by Prudence and of other holders of Burnside certificates, nor was any determination of these rights made in the Bankruptcy Court in the course of its administration or in connection with the distribution of any of the assets either of Prudence or of Amalgamated. The controversy, therefore, was brought to the State courts, as contemplated by the Plan of Reorganization, for determination of these relative rights unaffected by the reorganization consummated in the Federal court" (R. 366; 292 N. Y. 210 at p. 218).

Thus, it clearly appears that no Federal question was involved, but that the State court was determining, as it was both permitted and required to do by the reservations, substantive questions of state law as of a time just prior to the filing of the petition.

The petitioner has attempted in its brief to assimilate the reservation in the order confirming the Zo-Gale Plan, considered in *Prudence Realization Corporation* v. *Geist*, 316 U. S. 89, with the reservations contained in the Burnside and Prudence Plans. Although it is stated in petitioner's brief, at page 12 thereof, that "the pertinent provisions of each Plan are substantially identical," this statement is not accurate, since the Zo-Gale Plan contained no reservations whatsoever. The only reservation was contained in the order confirming the Plan, when the Court, in closing the Zo-Gale proceeding, reserved jurisdiction to try the bankruptcy issue

then pending undecided before it. As even petitioner is forced to admit, at the top of page 15 of its brief, the question had therefore to be considered "as it existed at the time of the reservation"; that is to say, after the Plan had been confirmed without an agreement that the relative rights would remain unaffected by either the Bankruptcy Act or the reorganization Plan, whereas the reservations in the Burnside Plan require the determination of the question of parity as a matter of substantive right as of a time immediately preceding the filing of the petition.

Prior to the bankruptcy, the certificate holders bore a certain relation to the guarantor, and the guarantor's repurchased certificates had acquired a certain standing as to priority of lien. These relative rights and priorities could have been adjudicated prior to the bankruptcy as a matter of state law, or even during the course of the bankruptcy in the state courts by permission of the bankruptcy court. *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. 478-483. Hence the reservation in the guarantor's Plan significantly chose February 1, 1935, the date of the approval of its petition. The effect of the reservations was to carry the entire set of relations through the proceedings intact, so that they emerged from the bankruptcy after the final orders completely unchanged. Any other interpretation of the reservations either renders a large portion of both Plans nugatory, or, as the Court of Appeals said (R. 367), forces a modification of the Burnside Plan, and despite the agreements contained in the Plans, gives the petitioner, as successor of the defaulting guarantor, a higher position than the guarantor itself had. The reservation contained in the order closing the Zo-Gale proceeding was not a part of the Plan, did not define the treatment to be accorded to the certificates if subordinated, and had not been bargained for by the certificate-holders as a part of the consideration for their consents thereto. On the contrary, all the consents to the Zo-Gale Plan had been filed before the entry of the order containing the reservation (R. 182-184). Therefore, there could be no provisions such as those in the Burnside Plan for the treat-

ment of the certificates after the adjudication of the reserved question, in ways which differed, as a matter of agreement, from the bankruptcy rule of distribution.

The question in the *Geist* case was the strictly legal one of the guarantor's rights as a matter of bankruptcy distribution in the estate of the bankrupt, Amalgamated Properties, Inc. That question was reserved by the bankruptcy court itself in its own order, for determination by it, in, and as part of, the bankruptcy proceeding then pending before it. Distribution was ultimately to be made, not in accordance with any agreement, but "in accordance with the final adjudication of such court" (R. 184). Thus in deciding the question of bankruptcy distribution in the bankruptcy court, the bankruptcy rule necessarily applied. The question in the present case is, by force of the reservations, one of substantive rights created prior to the bankruptcy.

POINT II.

THE NEW YORK RULE OF SUBORDINATION IS ONE OF SUBSTANTIVE STATE LAW BINDING UPON THE FEDERAL COURTS.

One ground on which the *Geist* case, 316 U. S. 89, did not follow the New York cases was that the rule laid down therein was no more than "a local rule governing the liquidation of insolvent estates." However, the New York Court of Appeals in the case at bar has clearly adjudicated that the rule of subordination adopted by it is one of substantive law (R. 361). It held that the suits before it were neither proceedings in bankruptcy nor state liquidation proceedings, but were brought to determine relative rights in property held for the satisfaction of a mortgage (R. 361), and that such rights must be determined by the law of New York, where the land is situated and the bond and mortgage and other agreements were made and delivered (R. 362). After a careful review and analysis of the bankruptcy proceedings, the Court came to the clearly correct conclusion that the question of parity had been unaffected by the Plans or by any determination made in the bankruptcy court (R. 366).

and that, therefore, it was necessary for the Court of Appeals to determine under the law of the State of New York whether the petitioner was entitled to parity of treatment for its certificates (R. 367). This question it then decided as a matter of its own substantive law, in the actions before it, which were not liquidation or insolvency proceedings.

Prior to this decision of the Court of Appeals in *Ferris* v. *Prudence Realization Corporation*, there was doubt as to whether the rule of subordination in the title and mortgage company cases referred to therein, expressed a principle of substantive state law or merely a rule of distribution, as apparently found by this Court in *Prudence Realization Corporation* v. *Geist*, *supra*, at page 95. Notwithstanding such doubt, *Erie R. R. Co.* v. *Tompkins*, 304 U. S. 64, required this Court to find and apply the state law even if it were not clear, and even if the answe which the highest state courts would ultimately give might be uncertain.

Meredith v. *Winter Haven*, 320 U. S. 228, 237-238.

However, subsequent to the decision of this Court in the *Geist* case, the highest court of the State of New York has decided in the *Ferris* case that its principle of subordination is not merely a rule of distribution in insolvency proceedings, but is a principle of substantive state law applicable in all actions (R. 361, 362). Such decision requires a change in later rulings by Federal courts on the same point.

Madden v. *Metropolitan Life Insurance Co.*, 138 F. 2d 708 (C. C. A., 5th, 1943); cert. den. 64 S. Ct. 945;
Meredith v. *Winter Haven*, *supra*, at p. 238;
Erie R. R. Co. v. *Tompkins*, *supra*.

The question as to whether a principle of local law enunciated by a state court is a principle of substantive law or of adjective law, is itself one which must be settled by the state court. When the answer has been given by the highest state court, it is binding upon the Federal court, and the doctrine of *Erie R. R. Co.* v. *Tompkins* comes into play.

Palmer v. *Hoffman*, 318 U. S. 109, 117;
Francis v. *Humphrey*, 25 F. Supp. 1;
Sampson v. *Channell*, 110 F. 2d 754 (C. C. A., 1st, 1940, cert. den. 60 S. Ct., 1099);
Fort Dodge Hotel Co. v. *Bartelt*, 119 F. 2d 253, 258 (C. C. A., 8th, 1941).

Since the petitioner's certificates were subordinated as a matter of substantive state law prior to the bankruptcy, and since the reservations in the two plans require the present determination of the question unaffected by the bankruptcies, the New York Court of Appeals clearly reached the correct result and the petition for a writ of certiorari must be denied.

The second ground on which this Court in the *Geist* case did not follow the New York rule was that the conclusion of subordination was arrived at not from an examination of the relevant documents read in the light of surrounding circumstances, but simply from a "presumed intention" flowing from the application of the supposed rule of distribution. The opinion of the Court of Appeals in *Ferris* v. *Prudence Realization Corporation* does not rely on any "presumed intention," but on the contrary contains an exhaustive analysis of the relevant documents (R. 367-370). The Court considered the provisions of the deposit agreement (R. 368), the provisions of the certificate (R. 369), and the provisions of the guarantee (R. 370), and on the basis of these and other circumstances arrived at the conclusion that there was an actual agreement, and evidence of actual intent, to subordinate the guarantor (R. 373).

Thus, the deficiencies which this Court noted in the opinion of the Circuit Court of Appeals in *Geist* v. *Prudence Realization Corporation* (122 F. 2d 503) have been removed. There is on this record no room for the application of the arguments which prevailed in *Prudence Realization Corporation* v. *Geist*.

POINT III.

IRRESPECTIVE OF THE NEW YORK RULE, THE GUARANTOR'S CLAIMS, HAVING BEEN ACQUIRED AS AN INCIDENT OF ITS GUARANTY, MUST BE SUBORDINATED UNDER THE GEIST CASE.

After deciding not to apply the New York rule in the *Geist* case, this Court stated that "the question remains whether there is any equity arising from the Prudence Company's failure to perform its contract of guaranty, which a bankruptcy court should recognize as requiring subordination. * * *" 316 U. S., *supra*, pp. 95-96. It found that such equitable basis was wanting. However, the facts heretofore stated concerning the acquisition of the guarantor's certificates in this case prove conclusively that here such equitable basis does exist. In the *Geist* case, the guarantor sought parity for an unissued or "uncertificated" part of the mortgage amounting to $7,200., and for reacquired certificates amounting to $816.67.

This Court found that the guarantor had not acquired these interests as an "incident" to the guarantee and its rights were not "those of a subrogee". As to the $7,200 unissued part of the mortgage, this was necessarily true, since the rights were residual rights in the mortgage, acquired when the guarantor made the original mortgage loan, prior to its execution of the guaranty.

With respect to the $816.67 of repurchased certificates, this Court's finding was clearly required by the specific admission that the certificates were purchased as investments in the regular course of business. In the *Geist* proceeding, Prudence Realization Corporation, the guarantor's successor, alleged with respect to said repurchase as follows:

> "It was the intention in each instance upon the acquisition of the aforementioned certificates by Prudence to hold such certificates as investments, and the acquisition by Prudence was not intended at any time to constitute a cancellation or payment under its guaranty." (Record on appeal in *Prudence Realization Corporation* v. *Geist*, p. 24.)

This was specifically admitted by Geist, the Trustee, as follows:

> "William T. Cowin, president of Prudence Realization Corporation, the respondent herein, formerly a trustee of the debtor, states in his affidavit that in many instances The Prudence Company, Inc. reacquired certificates theretofore sold to and held by the public, and that it was the intention of The Prudence Company, Inc., to hold such certificates in its own investment portfolio as an investment.
>
> "This deponent does not take any exception to such statement but respectfully submits that this presents an incomplete picture." (Record on appeal, *supra*, fols. 118-120.)

In the Burnside Issue, the facts are entirely different. There was no "unissued" or "uncertificated" part of the mortgage. All the certificates were acquired by the guarantor *after default* as an incident to its guaranty, and in an obvious attempt to reduce or postpone its guaranty liabilities. The rights which petitioner now asserts are those of a subrogee, and hence there is a clear equitable basis for requiring subordination under the rules laid down in *Prudence Realization Corporation* v. *Geist*.

The precarious financial condition of the guarantor immediately preceding and during the time when it was re-acquiring its own defaulted securities has already been described. It may be briefly recapitulated, as follows:

1. November, 1931, the guarantor seeks a $25,000,000 loan from Reconstruction Finance Corporation, admitting in its application therefor that the mortgages, if foreclosed, would not bring enough to cover its guaranty liabilities—and, by necessary implication, that the guarantor without the loan would be unable to meet them.

2. December, 1931, the guarantor's balance sheets show it to be unable to meet its maturing guaranty liabilities for the year 1932.

3. Its guaranty liabilities for 1932 are over twenty-five times as great as for 1931, and for 1933, are about $10,000,000 more again.

4. January, 1932, the Burnside mortgage is in default in the payment of an instalment of principal.

5. January, 1932, the guarantor suspends principal payments on its certificates and invokes its eighteen months' grace clause.

6. February, 1932, the Reconstruction Finance Corporation loan is granted for $20,000,000, but the guarantor does not revoke its suspension of principal payments.

7. March 3, 1932, the guarantor acquires its first Burnside certificate.

8. June, 1932, the guarantor commences heavy acquisitions of Burnside certificates.

9. July 1, 1932, the Burnside mortgage and certificates mature and are not paid.

10. January 23, 1933, the last Burnside certificate is acquired.

Prior to March 3, 1932, the guarantor had not owned any Burnside certificates (Stipulation, par. 6, R. 321). In June, 1932, immediately preceding maturity on July 1, 1932, the guarantor acquired certificates aggregating $23,852.75 in principal amount. The balance of the certificates aggregating $405,860.11 in principal amount were acquired after maturity, and after default (R. 59-63).

The certificates were not cancelled at the time because, as the guarantor's assistant treasurer testified, they had matured, the mortgage had not been paid off, and cancellation was unnecessary (R. 216). Nevertheless, on March 1, 1933, certificates aggregating $425,212.86 were cancelled and one

certificate in that amount was issued to Reconstruction Finance Corporation. On April 4, 1933, this certificate was cancelled and another in the same amount was issued to The Prudence Company, Inc. (R. 63). The cancellations and reissues of the remaining certificates are shown at R. 63.

Three methods were used to acquire the certificates. The first was through a secret and concealed brokerage account called the "Pender-Bucklee-Merriam" account (R. 63), known only by a number (R. 224). This account was used to acquire certificates at prices described as "substantially less than the par value thereof" (R. 23) and "rather substantial discounts" (R. 216). The discounts ranged from 15% to 34% (R. 63), although the guarantor advertised to its security holders that it would attempt to repurchase directly from them at discounts of only one per cent (R. 210). The "Pender-Bucklee-Merriam" account was created "within the first three months of 1932" (R. 216), or shortly after the guarantor invoked the eighteen months' grace clause, and shortly before the Burnside mortgage and certificates matured.

To the extent that the guarantor purchased its matured and default securities at a discount, it was reducing *pro tanto* its guaranty liabilities. Hence, when it later asserts a claim based upon the certificates so acquired, it is in the position of a surety which has only partially fulfilled its obligations. Payment to it before the creditors are paid, will therefore not be permitted.

The second method of acquisition was to have the holders of matured or maturing Burnside certificates exchange them for certificates in other issues of later maturities (R. 212; Exhibit D, R. 5961). Sometimes the certificate holder would be given part cash and a new investment for the balance. All such new investments were later maturities than the Burnside certificates and were not yet in default. (Stipulation, par. 2, R. 320).

The purpose and effect of this practice was obviously to extend the time for the payment of the guaranty liabilities. Therefore, any claim based on certificates so acquired is de-

rived from, or incident to, the guaranty, and was not acquired independently of it.

The third method of acquisition was the direct purchase from the holder for the minimum amount of cash which he would take (R. 212, 226-227). When the certificate holder pressed for cash, his certificate "would be repurchased at five or six or seven, or sometimes even ten per cent. discount" (R. 227). Many certificates were purchased at "par flat" (R. 61-62), *i.e.* at a discount amounting to the accrued interest thereon (R. 227).

These acquisitions at a discount, were for the purpose of reducing the guaranty liabilities and petitioner, as successor to the defaulting guarantor, is now asserting rights which are derived from partial performance of the suretyship obligation.

Thus, the *Geist* case differs factually from the present case in that there is here a clear equitable basis for subordination in the circumstances surrounding the acquisition of the certificates by the guarantor. These undisputed circumstances show the acquisition of defaulted securities at substantial discounts just prior to and after maturity, when the guarantor, if not insolvent, had at the least, a seriously impaired capital, and was forced to borrow to keep in business. To say that such acquisitions were "independent of the guaranty" is to fly in the face of the facts. Under those circumstances, the guarantor could have had no thought but to reduce or postpone its pyramiding guaranty liabilities. It was struggling desperately to prevent or delay the debacle which finally occurred. It could not have purchased these certificates in the ordinary course of business, or for investment purposes, because at that time its business was not running any "ordinary course", and it had no funds available for investment in defaulted securities. It was simply engaging in salvage operations.

POINT IV.

THE APPLICATION OF THE RULE OF SUBORDINATION WILL NOT CREATE ANY PREFERENCE.

Petitioner argues that subordination will result in an improper preference to Burnside certificate holders. This argument is invalid under the circumstances of this case for the following reasons:

(1) Since subordination occurred as a matter of substantive state law more than two years before the bankruptcy, the recognition in bankruptcy of the relative rights and priorities so created does not constitute an improper preference under the Bankruptcy Act. The argument that subordination creates an improper preference is sound only on the assumption that the subordination was brought about through a state rule of distribution not affecting substantive rights and liabilities. This assumption has been destroyed by the decision of the Court of Appeals in *Ferris v. Prudence Realization Corporation*, 292 N. Y. 210.

(2) The reacquired certificates were assets of the bankrupt, to be liquidated by petitioner for whatever their value might be. If, by reason of subordination as a matter of substantive state law, their value was reduced, petitioner will realize less, but whatever the value, the asset, when liquidated, will be shared equally and ratably by all creditors of the guarantor, without preference or priority in favor of the certificate holders in the Burnside or any other issue.

(3) Petitioner has urged that a preference may result from subordination because in bankruptcy the guaranty claims must be allowed in full. In state rehabilitation proceedings, it argues, the guarantee claimants are treated as secured and required to reduce their claims, so that subordination of reacquired certificates is there equitable, but such equity disappears in bankruptcy. However, the plan under which the petitioner holds title to the

reacquired certificates, provides that the guaranty claims (although technically allowed in full) must be treated as secured and reduced by the value of the security. The basis of the argument is thus destroyed by the agreement reached in the Plan and although the lien position of the Burnside certificate holders is improved by subordination, their claims in the general assets of the guarantor suffer by the reduction, and this reduction operates to the general benefit, equally and ratably, of all creditors of the guarantor. Petitioner may not have the benefits of both the reduction in the claims *because* of the security, and also the full benefit of the security itself.

4. Even if subordination, and the results which flow from it as a matter of law, might be said to create a preference in bankruptcy *simpliciter* as distinguished from corporate reorganization in the Bankruptcy Court, such legal results have been prevented from occurring by reason of the agreement in the reorganization plan which provides otherwise. The Burnside plan provides that if there should be subordination, the money otherwise allocable to the subordinated certificates shall be divided between additional interest on non-subordinated certificates, and a sinking fund for the purchase of such certificates. Such provisions were not in the Zo-Gale plan considered in the *Geist* case, in which the results of subordination would follow strictly as a matter of law. The Burnside plan prevents these results. The operation of the sinking fund will reduce the senior lien and thus enhance the value of the subordinated certificates. Since the guarantor accepted these beneficial provisions, petitioner, as its successor, may not urge as a reason against subordination, a preference which can be created only in their absence.

POINT V.

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

It is urged that by reason of the foregoing the petitioner has failed to show any reason for the issuance of a writ of certiorari and that its petition should be denied.

Respectfully submitted,

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Counsel for City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees, etc., Respondents.

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 137

PRUDENCE REALIZATION CORPORATION,
Petitioner,

—against—

JOSEPH W. FERRIS, GEORGE L. LONG and HENRY LEIFERT as Trustees under a Declaration of Trust dated as of July 1st, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, CITY BANK FARMERS TRUST COMPANY and MARTIN S. LINDGROVE as Trustees under the Last Will and Testament of HERMAN STUTZER, deceased, on behalf of themselves and other holders of certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, SOLOMON ZAUDERER, MILTON KIMMELMAN, IRVING ZAUDERER and CHARLES KIMMELMAN, doing business as KIMMELMAN AND ZAUDERER, on behalf of themselves and all other holders of Prudence Bonds Corporation participating certificate issue, and HUNTER L. DELATOUR, RAYMOND REISLER and JEROME THRALLS, Trustees of Realty Associates Securities Corporation, Debtor, holders of Burnside Certificates,
Respondents.

BRIEF FOR RESPONDENTS JOSEPH W. FERRIS, HENRY LEIFERT AND GEORGE L. LONG AS TRUSTEES UNDER A DECLARATION OF TRUST DATED AS OF JULY 1, 1938.

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HENRIETTA KRIGER,
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Respondents.

BRIEF FOR RESPONDENTS JOSEPH W. FERRIS, HENRY LEIFERT AND GEORGE L. LONG AS TRUSTEES UNDER A DECLARATION OF TRUST DATED AS OF JULY 1, 1938.

THE OPINIONS OF THE COURT BELOW.

The opinion in the Supreme Court is unreported (R. 221).

The opinion in the Appellate Division is reported at 266 App. Div. 543 (R. 231).

The opinion in the Court of Appeals is reported at 292 N. Y. 210 (R. 241).

STATEMENT.

Actions No. 1 and No. 2 were brought for the same relief. Action No. 1 was brought by Joseph W. Ferris, George L. Long and Henry Leifert as Trustees under a Declaration of Trust for first mortgage participation certificates known as the Burnside Issue. They are respondents in this court and will be hereinafter referred to as Trustees-respondents. The action was for a declaratory judgment declaring the rights and interests of Prudence Realization Corporation, hereinafter referred to as the petitioner, and of other certificate holders in the bond and mortgage for which the Trustees-respondents are trustees. Action No. 2 was brought by a certificate holder for the same relief. The two actions were consolidated in the New York Supreme Court and proceeded as one action.

Trustees-respondents were appointed as trustees under a plan of reorganization of the Burnside mortgage issue promulgated and confirmed in the United States District Court for the Eastern District of New York. The plan under which they were appointed dealt only with the Burnside issue, although it was promulgated as part of a proceeding then pending to reorganize Amalgamated Properties, Inc., hereinafter referred to as Amalgamated, under Section 77 B of the bankruptcy law (R. 89).

Amalgamated was the owner in fee of the premises covered by the mortgage. It was in no wise liable to the certificate holders, not having made the bond nor entered into any engagement to pay either principal or interest. Amalgamated was a subsidiary of The Prudence Company, Inc., herein-

after referred to as Prudence, and it acquired title in June, 1932 after the prior owner had defaulted on the mortgage (R. 14).

The petitioner is a successor in interest to Prudence by reason of the reorganization of Prudence under Section 77-B of the Bankruptcy Act. Prudence was the guarantor of the principal and interest of the mortgage certificates (R. 12). In February, 1935, a petition for reorganization was filed on behalf of Prudence under Section 77-B of the Bankruptcy Act (R. 14). Originally, the proceeding to reorganize Amalgamated was part of the Prudence proceeding, but in April, 1938, an order was entered severing the two proceedings and thereafter, the Prudence proceeding and the Amalgamated proceeding continued as separate and distinct proceedings (R. 89).

Amalgamated, in addition to owning the Burnside property was also the owner of various other properties acquired by it in substantially the same way that it acquired the Burnside property. The plan for the Burnside issue did not involve any other property of Amalgamated. Other plans for other certificate issues, not material here, were promulgated as separate and distinct plans of reorganization. Each issue was treated as a separate and distinct proceeding just as if each property were owned by a separate and distinct corporation, each with its own creditors (R. 125).

The bond and mortgage were originally in the sum of $1,260,000 (R. 172). The bond and mortgage by their terms became due July 1, 1932 (R. 89), and all certificates matured on that day (R. 90). Certificates were originally issued to the full extent of the mortgage but certificates totaling $84,000 were retired by amortization payment of the former owner (R. 90). Most of the certificates acquired by Prudence were acquired after July 1, 1932 and a few were acquired during the month of June, 1932 as shown by Defendant's Exhibit "D" (R. 40).

The previous owner of the premises had defaulted in an installment of principal due January, 1932 and Prudence caused the property to be acquired by Amalgamated in June, 1932 (R. 90).

The Burnside plan provides for the execution of a declaration of trust by the Trustees-respondents (R. 98); for the transfer of title to the mortgage and title to the real estate to the Trustees-respondents (R. 97). It declares that the Trustees-respondents shall be the legal owners in trust for the benefit of certificate holders (R. 118). It assigns to the trustees all rights which the certificate holders had as a class (R. 106). It provides that the Trustees alone may enforce the bond and mortgage and that the rights of the certificate holders shall be those of the beneficiaries of a trust (R. 102), for income interest to certificate holders up to 2½% per annum (R. 100), and for the filing of annual accounts by the Trustees-respondents in the Supreme Court of the State of New York (R. 98). It provides for retirement of certificates through operation of a sinking fund (R. 101). It provides for payment to Amalgamated of $1,000 out of moneys obtained from operation of premises as consideration for the deed (R. 122). As originally promulgated, it provided that all certificates were on a parity. This provision however, was amended (R. 120) by striking out the paragraph providing for parity and substituting an entirely new provision (R. 120). This new provision is set forth at length in the Record (R. 120, 121, 122). Part of it is quoted in petitioner's brief, but part only.

The first sentence of the new provision states that except as provided in the provision, all certificates shall be entitled to participate on a parity, but excludes Prudence from the first operation of the sinking fund. The second sentence states that a question has arisen with respect to the rights of Prudence. The third sentence states that no distribution shall be made to Prudence until a final adjudication by a court of competent jurisdiction on the issue. There follows a provision declaring that distribution shall be made in accordance with an adjudication and a further provision directing the Trustees-respondents to hold monies in escrow, which Prudence would be entitled to if it were on a parity. Next follows a modification of the provisions for distribution in accordance with the final adjudication by the provision

that publicly held certificate holders would receive only half of the interest allocated to the Prudence certificates up to 5% per annum, and the balance would be placed in a sinking fund. Finally, the provision prevents the retirement of Prudence certificates by the sinking fund unless parity is adjudicated.

The Petitioner has stated upon several occasions in its brief, that this provision was inserted solely to avoid delay in consummating the 77-B plan for the certificate issue. There is nothing in the record of the proceedings held in the bankruptcy court which justifies such a statement and petitioner cannot point out anything but its own unsupported statement to that effect. We believe that it was the intention of the parties to leave the issue of parity unaffected by the plan and hence there was no reason for an adjudication of the issue in the bankruptcy court, and we shall develop that point further under our argument. In any event, we submit that the effect of this provision of the plan is to be determined by an analysis of the meaning of its provisions. In such an analysis, we submit that the reasons assigned by the petitioner play no part.

The complaint contains two causes of action. The first seeks an adjudication of the relative rights of the parties on the question of parity; the second, an accounting of money received by Prudence upon its certificates as interest and to which other certificate holders would be entitled in the event Prudence certificates are subordinate.

The New York Court of Appeals in an opinion by Judge Thacher, unanimously held that the certificates held by the petitioner are subordinate to those held by others in an opinion printed on page 241 of the record, and reported at 292 N. Y. 210. It decided:

FIRST: That the Burnside Plan of Reorganization did not define or determine the rights of the parties with respect to parity, nor were such rights determined by the Bankruptcy Court in the course of its administration or in connection with the distribution of any of the assets of either Prudence or Amalgamated;

SECOND: That where neither a Plan of Reorganization nor any order in the proceedings undertakes to modify the legal rights of the parties, that such rights remain as they were before the institution of the bankruptcy proceeding;

THIRD: The under the New York Law the certificates held by Prudence are subordinate to those publicly held.

We quote from the opinion of the Court of Appeals as follows, page 245 of the Record (*Ferris* v. *Prudence Realization Corp.*, 292 N. Y. 210, at page 218):

> "Upon this record it appears without contradiction that the Burnside plan of reorganization did not attempt to define or determine the relative rights of Realization Corporation as the holder of certificates acquired by Prudence and of other holders of Burnside certificates, nor was any determination of these rights made in the Bankruptcy Court in the course of its administration or in connection with the distribution of any of the assets either of Prudence or of Amalgamated. The controversy, therefore, was brought to the State courts, as contemplated by the plan of reorganization for determination of these relative rights unaffected by the reorganization consummated in the Federal court.
>
> "Corporate reorganization in the Federal courts is a process of adjustment and modification of legal rights frequently involving the impairment of contractual obligations under plans predicated upon the consent of security holders and creditors and upon the court's approval of the plan as fair and equitable and therefore binding upon the minority. If neither the plan nor any order in the proceeding undertakes to modify the legal rights but leaves those rights to be determined by courts of competent jurisdiction, such courts have no power to impair the legal or equitable rights of the parties. The court below erroneously regarded the *Geist* case as establishing a rule. It was only effective in determining a question affecting the administration and distribution of assets in the particular reorganization before the court. To conclude

that our decision is ruled by the decision of the Supreme Court in the *Geist* case, we should have to modify the Burnside plan of reorganization, which did not undertake to determine, define or modify the relative rights of certificate holders under the Burnside mortgage."

SUMMARY OF ARGUMENT.

POINT I. Prior To The Institution Of The Bankruptcy Proceeding New York Law Subordinated Certificates Held By Petitioner.

POINT II. Priority Rights Acquired Under State Law Are Not Affected By A Reorganization Proceeding In Which Such Rights Are Not Defined, Determined Or Modified.

POINT III. The Bankruptcy Proceedings Did Not Accord Petitioner Parity.

POINT IV. The Rule In Prudence Realization Corp. v. Geist, 316 U. S. 89, Does Not Apply To This Case.

POINT V. The Burnside Plan Cannot Be Modified Or Amended In This Action. The Plan Is Not Subject To Collateral Attack.

POINT VI. The Judgment Is Right And Should Be Affirmed.

POINT I.

PRIOR TO THE INSTITUTION OF THE BANKRUPTCY PROCEEDING NEW YORK LAW SUBORDINATED CERTIFICATES HELD BY PETITIONER.

The State of New York is the place where the land is situated and where the bond and mortgage, the participation certificates, the agreement of guarantee and the deposit agreement were made and delivered. Prior to the institution of any proceeding in bankruptcy, any litigation involving the rights of any parties in and to any of these instruments, would be determined according to the law of the State of New York. This would be true whether the action was in the New York Court or in the federal court, and whether the action was one at law or in equity.

Erie R. Co. v. *Tompkins*, 304 U. S. 64;
Ruhlin v. *N. Y. Life Ins. Co.*, 304 U. S. 202;
Huddleston v. *Dwyer*, 322 U. S. 232;
Meredith v. *Winter Haven*, 320 U. S. 228.

The decision under such circumstances, would involve no federal question and would not be the subject of review by this court.

Sauer v. *City of New York*, 206 U. S. 536;
Murdock v. *City of Memphis*, 20 Wall 590;
Central Hanover Bank v. *Kelly*, 319 U. S. 94.

We respectfully submit that had the issue of parity been submitted for determination prior to the institution of the bankruptcy proceedings, that under the well-settled doctrine of the New York Court, the certificates held by the general public would have been declared to be superior to those held by Prudence.

Ferris v. *Prudence Realization Corp.*, *supra*, (292 N. Y. 210).

POINT II.

PRIORITY RIGHTS ACQUIRED UNDER STATE LAW ARE NOT AFFECTED BY A REORGANIZATION PROCEEDING IN WHICH SUCH RIGHTS ARE NOT DEFINED, DETERMINED OR MODIFIED.

We respectfully submit that unless proceedings held in the bankruptcy court deprived the publicly held certificates of this superiority, that such certificate holders are still entitled to priority. The question before this Court, is the narrow one: Did the bankruptcy proceedings accord Prudence parity? Admittedly, prior to the institution of the bankruptcy proceeding, Prudence did not have parity. If it did not get parity in the bankruptcy proceedings, it cannot claim parity in this action. If indeed, the proceedings in the bankruptcy court accorded Prudence parity, then of course, Prudence would be justified in claiming that a "right, privilege or immunity" granted under a statute of the United States, is denied it by the decision below. The sole federal question which can be raised before this court must be based upon such "right, privilege or immunity." If on the other hand, the bankruptcy proceeding did not accord Prudence parity, then it cannot be claimed that the Court of Appeals denied any such federal right.

We shall devote ourselves to the question of whether or not the bankruptcy proceedings accorded Prudence parity. We have used the term "bankruptcy proceedings" loosely, intending thereby to encompass the provisions of the bankruptcy law, orders made during the course of the bankruptcy proceeding, and the plan of reorganization confirmed by the court.

We do not understand that the petitioner claims that the mere filing of the petition in bankruptcy washes away rights of priority theretofore existing. No such claim could reasonably be made. The filing of a petition in bankruptcy does not of itself, alter the existing rights of parties. Property in the hands of the bankruptcy court is subject to all

of the equities to which it was subject in the hands of the bankrupt.

Hewit v. *Berlin Machine Works*, 194 U. S. 296;
Security Warehousing Co. v. *Hand*, 206 U. S. 415.

In the case of *Security Warehousing Co.*, v. *Hand*, this Court said at page 423:

> "It is no new doctrine that the assignee or trustee in bankruptcy stands in the shoes of the bankrupt, and that the property in his hands, unless otherwise provided in the bankruptcy act, is subject to all of the equities impressed upon it in the hands of the bankrupt."

In an ordinary bankruptcy, the adjudication discharges no liability of the bankrupt. It is the discharge and not the adjudication which frees the bankrupt from debt. Of course, during the bankruptcy proceeding, there is a suspension of the rights of the creditor to enforce collection of the debt. The bankruptcy court takes full possession of all assets of the bankrupt and administers it. The institution of bankruptcy proceedings does not automatically stay proceedings in other courts, although the bankruptcy court can and does enjoin state court proceedings. The jurisdiction of the bankruptcy court to administer the property of the bankrupt, is exclusive. In an ordinary bankruptcy case, if no discharge is granted, a creditor may pursue the adjudicated bankrupt and enforce satisfaction. When discharged, the bankrupt is cleared of his debt. Reorganization proceedings under Section 77 B of the Bankruptcy Act are bankruptcy proceedings. They are a substitute for reorganizations under equity receivership.

Securities Exchange Commission v. *United States R. & Imp. Co.*, 310 U. S. 434.

Within the framework of the statute, a corporation is permitted to modify or alter the rights of creditors and of stock

holders. The manner and degree in which such rights are modified or altered is to be embodied in a writing, is to be accepted by the requisite number of creditors affected by the plan. The consent of the stockholders is not required if the debtor is insolvent or their rights are not effected by the plan. Upon confirmation of the plan, it is binding upon all persons. It is the plan when approved and confirmed which determines the rights of creditors and stockholders. By the necessities of the case, all plans are not alike. The two plans of reorganization printed in the record namely, the Burnside plan and the Prudence plan, are different. They are different because the problems involved in each reorganization are different. In this case, there is no contention made that any order in the proceeding accorded Prudence parity. Nor is there a claim that any statute has that effect. No provision of the Bankruptcy Act has been pointed out and none can be pointed out which automatically accords Prudence parity. We must therefore look to the plan for determination of this question.

POINT III.

THE BANKRUPTCY PROCEEDINGS DID NOT ACCORD PETITIONER PARITY.

The petitioner in its argument has tried to make it appear that the Court of Appeals overlooked or disregarded modifications of the rights of certificate holders and hence fell into error, but this argument overlooks the issue before the Court of Appeals. That issue was whether or not Prudence certificates were on a parity or subordinate. That was the only issue involved in the case, and the issue to which the Court directed its attention in its opinion. The question for its determination was whether in the bankruptcy proceeding, the Prudence certificates which otherwise would be subordinate had been accorded parity and the determination of the Court was that neither the plan nor any order in the bankruptcy proceeding accorded such parity.

modify the rights of the parties, it would have been simple to say so in definite language. If the question was whether or not such a state law priority was to be recognized by the bankruptcy court, that too, could have been explicitly stated. Even if there were a desire for haste in consummating the plan, the bankruptcy court could have retained exclusive jurisdiction to determine the question either before or after consummation of the plan. In 1938, when this plan was approved by the certificate holders and the Court, all were fully aware of the many state court proceedings then pending and undetermined in which similar issues of parity as between certificate holders and guarantors were involved. *Prudence Realization Corporation* v. *Geist*, 316 U. S. 89, had not yet been decided. The parties unquestionably were thinking in terms of state law. The Judge, who confirmed the Burnside plan, was likewise thinking in terms of the rights of the parties under the state law. We say this because he was the same Judge who was in charge of the reorganization involved in the *Geist* case, and in his opinion in that case, he determined the question solely upon consideration of the pertinent state court decisions. The reversal of his decision in that case by this court does not change the fact that he thought that the question of parity was determinable according to state law. We cannot bring ourselves to seriously consider petitioner's suggestion that the reservation of the question meant that the question was to be determined by any court in accordance with the rules of distribution prevailing in bankruptcy. Bankruptcy courts often consent that the interest of parties in property ~~without~~ within the jurisdiction of the bankruptcy court, be adjudicated by a state court, either because of convenience or what is thought to be unsettled state law.

> *Thompson* v. *Magnolia Company*, 309 U. S. 478;
> *Foust* v. *Munson S. S. Lines*; 299 U. S. 77.

The purpose of referring questions of state law to state courts for decision is so that the laws would not "by the

"accident of federal jurisdiction—been determined contrary to the law of the State, which in such matters is supreme." (*Thompson* v. *Magnolia Company*, *supra*, at page 484.)

We have not found, nor has counsel for the petitioner pointed out any case where the bankruptcy court has relegated to a state court for decision a question involving the interpretation and effect of the Bankruptcy Act. By the very nature of things, the bankruptcy court has the final say on the bankruptcy law, and if it were the intention of the parties to agree that the question of whether the priority rights of the certificate holders were cognizable in the reorganization proceeding, not only would they have said so, but the Court would have, by a proper order, reserved the question for decision by the bankruptcy court.

If we are to consider the reservation as meaning that the question is to be determined in the light of the bankruptcy proceeding, we will arrive at the same result. Since no order in the proceeding nor the plan itself, modified the rights of the parties respecting priority or parity rights, the conclusion must be that those rights have not been affected by the plan.

In specification of errors, number 3, petitioner says that the question of parity is to be determined as a matter of Bankruptcy Law, because the Bornside certificate issue and Prudence were reorganized under Section 77-B. We deem it therefore, proper to point out that the Prudence plan made no effort to determine the question of parity. No such issue was raised in the Prudence proceeding. The Prudence plan however, did refer to the existence of an undetermined parity issue. In Article IV, section 2 of the Prudence plan, there is provision for the distribution of the assets of Prudence (R. 59) and in subdivision (a), (R. 60), it is provided that if uncertainty should exist whether certificates held by Prudence are on a parity with other certificates, the directors of the petitioner shall assume in the first instance that parity does not exist.

The rights to the money claimed in the second cause of action were preserved by the order confirming the Prudence plan in paragraph 20 (R. 82), as follows:

> "The Section 77-B Trustee of the Debtor is hereby further directed to transfer to the New Company forthwith, subject to all then existing equities and rights of third parties therein, all assets held by said Section 77-B Trustee for the account of others, or held by said Section 77-B Trustee in any agency or other segregated account pending settlement or determination of equities or rights asserted by others."

We thus see that the Prudence plan as well as the order confirming it did not determine the issue of parity and did not and made no effort to modify the rights of the parties. The Third specification of error can have no validity unless the mere reorganization of Prudence and the Burnside issue under Section 77-B with nothing more in and of itself, worked a change in the rights of the parties. That of course, is not the law. We submit that reorganizations under Section 77-B of the Bankruptcy Act work no automatic changes in the rights of creditors or stockholders, that such rights are affected only if and to the extent they are modified and altered by a confirmed plan. Otherwise, the elaborate plans with their multifarious provisions confirmed in the Burnside and Prudence proceedings were futile and unnecessary.

POINT IV.

THE RULE IN PRUDENCE REALIZATION CORP. v. GEIST, 316 U. S. 89, DOES NOT APPLY TO THIS CASE.

By an elaborate comparison of a portion of the reservation contained in this case with that contained in the *Geist* case, petitioner is attempting to make it appear that the precise question involved in this case has been passed upon and determined by this court in the *Geist* case. This claim however, is entirely without substance. In the case at bar, the reservation was contained in a provision of the plan, having consents of the requisite number of certificate holders and confirmed by the Court. The provisions of the plan have been fully stated and need not be repeated here. The Court and the parties treated the question as one to be determined out-

side of the bankruptcy court. Both the *Burnside* case and the *Amalgamated* case were closed, completely and irrevocably, without the issue being presented for decision by the bankruptcy court, nor did the bankruptcy court reserve the question unto itself for future determination. Unless we are to treat lightly this deliberate conduct on the part of all parties, their practical construction of the meaning of these provisions cannot be disregarded. In the *Geist* case, the plan itself provided for parity and that provision of the plan was not amended in the order of confirmation. There, the order of confirmation reserved the question of parity and before the termination of the bankruptcy proceedings, an application was made to the bankruptcy court for a determination. The order closing the bankruptcy proceeding reserved the question for decision in the bankruptcy court (R. 129). There is no question but that while bankruptcy proceedings are still pending, full control over the plan and its execution still resides in the bankruptcy court. The plan itself did in fact provide for parity and there the Court reserved the question as to whether the plan should accord parity. That is actually the way this Court treated the question when it came here. In the very first sentence of the opinion in the *Geist* case, this Court said at page 90:

> "The question for our decision is whether an insolvent defaulting guarantor of certificates of participation in a mortgage, who is also the owner of a part of the mortgage indebtedness, is entitled to share pro rata in a distribation of the proceeds of the mortgage in a § 77-B bankruptcy reorganization."

The opinion mentions the requirements of the Bankruptcy Act, that a plan of reorganization must be one which "is fair and equitable and does not discriminate unfairly in the case of any class of creditors" and that "dividends of an equal percent" shall be made "in all allowed claims except such as have priority or are secured". It talks about "the claims of Prudence" and of the impropriety of the "denial of the right to prove its claim".

What this Court decided there is succinctly and accurately stated in the headnote of the official report. It is in substance, that an insolvent defaulting guarantor of mortgage participation certificates is entitled to share pro rata in the distribution of the proceeds of the mortgage in a 77 B reorganization proceeding; that the New York rule that the guarantor impliedly agreed to subordinate his own claim, is taken as a rule of state law governing state liquidation and is not applicable to bankruptcy proceedings; and lastly, that the Bankruptcy Act prescribes its own criteria for distribution to creditors.

This Court was not called upon nor did it pass upon the meaning of the language of the reservation in the *Geist* case. No such issue was presented.

To read into the plan of reorganization confirmed for the Burnside issue, the rule of this Court in the *Geist* case, is to do violence to the provisions of the Burnside plan. It cannot be done except by a modification of the plan adopted.

We do not claim as intimated by petitioner, that the rule in this case must be different because it was brought in a state court. The forum in which an action is brought does not control the law applicable. We say that the result in this case would have to be the same whether the action were brought in a state court or federal court, because the New York law is the controlling law. We say that the bankruptcy court might have altered the rights of certificate holders so as to deprive them of their priority under state law, but that neither in the proceeding nor in the plan were such rights altered.

We do not discuss the basis of the New York Court of Appeals' statement of the New York law. We do not do so because as we understand the rule, this Court is not concerned with state law, but we think it proper to point out that the decision in this case as to the state law is consonant with its previous rulings. Petitioner concedes this, for he refers to the Court of Appeals' "persistent policy of subordination". The decision in this case is not inconsistent with that in the *Geist* case and we see no point in discussing the other points raised by the petitioner.

POINT V.

THE BURNSIDE PLAN CANNOT BE MODIFIED OR AMENDED IN THIS ACTION. THE PLAN IS NOT SUBJECT TO COLLATERAL ATTACK.

Petitioner's argument amounts to this: that under the doctrine enunciated by this Court in *Prudence* v. *Geist*, a plan is not fair and equitable which does not accord Prudence parity and hence we must read into the confirmed Burnside plan a provision according Prudence parity, notwithstanding that the plan contains no such provision.

If the plan of reorganization or any order in the bankruptcy proceeding altered or modified the rights of the parties on the question of parity, it would be binding upon all courts, state and federal alike. It would be just as binding as the provisions extending the mortgage, reducing the rate of interest and curtailing the rights of certificate holders to take independent action, relegating them to rights as beneficiaries of an express trust.

Suppose the plan had by explicit language declared Prudence certificates to be subordinate, could the petitioner now be heard to say that the policy of the bankruptcy act had been violated? Can it say that the provision for interest distribution provided in the plan to follow subordination is an improper one? We submit that the plan as confirmed is binding upon all and that it is not open to collateral attack. Errors, if any, in the reorganization proceeding cannot be corrected in this action.

An order confirming a plan of reorganization is res adjudicata.

> *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371.

The Chicot County case was a suit on a bond issued by the Chicot County Drainage District which had been reorganized under the Municipal Debt Readjustments Act of 1934. The Act under which the petitioner had been reorganized was

subsequently declared to be unconstitutional by this Court. Nevertheless, this Court held that the decree approving the plan was res adjudicata and that it could not be collaterally attacked. There, this court said at page 378:

> "The remaining question is simply whether respondents, having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding but also as respects any other available matter which might have been presented to that end."

If the rule were otherwise a plan of reorganization would no longer be a charter which defines the rights of creditors and stockholders. Its provisions could no longer be relied upon in order to determine the manner and extent to which rights of creditors and stockholders have been altered and modified. Such a course cannot be permitted without destroying the binding force of the doctrine of res adjudicata and without endless litigation following in the wake of every reorganization proceeding.

May we be pardoned for one more illustration of the destructive force of petitioner's contention. In *Case* v. *Los Angeles Lumber Co.*, 308 U. S. 106, this court reversed a decree confirming a corporate reorganization because of the improper retention of stockholders' rights, which this court held did not meet the standards that the plan must be fair and equitable. But suppose the decree confirming the plan had not been appealed from, would not the plan be as fully binding as if its provisions met the standards of the law? Under such circumstances, could creditors be heard to say that the stockholders were not entitled to share under the plan because to do so makes the plan unfair and inequitable? We think the answer obviously is that a plan is not

open to any such collateral attack and an attack upon its provisions is available only in a direct review upon appeal.

We submit that in the case at bar, this court as well as the courts below were foreclosed from examining the provisions of the plan for the purposes of determining whether they are in fact fair and equitable within the meaning of the Bankruptcy Law. All parties are bound by those provisions. Under them, the rights of priority of certificate holders over Prudence have not been modified or altered.

There is no attempted subversion of the policy of the Bankruptcy Law such as existed in *Local Loan Co. v. Hunt*, 292 U. S. 234. There, the State law attempted to nullify the effect of a discharge in bankruptcy by declaring that an assignment of future wages created a lien which survived the discharge in bankruptcy. Since the purpose and policy of the bankruptcy law was to permit a debtor to start afresh free from obligations consequent upon business misfortune, an attempt to reach his future earning under the guise of a lien was held to be destructive of the purposes and policy of the act.

Nor is there present here any attempt to narrow the protection secured by a federal act such as existed in *American Railway Express Company v. Levee*, 263 U. S. 19.

The Court of Appeals recognized the right of the Bankruptcy Court to modify and alter the rights of creditors. It gave full effect to the provisions of the Bankruptcy Act and the provisions of the plan of reorganization. The finding by the Court of Appeals that the plan did not alter or modify the rights of the parties with respect to the question of parity is amply supported by the record.

POINT VI.

THE JUDGMENT IS RIGHT AND SHOULD BE AFFIRMED.

Respectfully submitted,

CHARLES H. KRIGER,
Counsel for Respondents
Joseph W. Ferris, etc.

HENRIETTA KRIGER,
Of Counsel.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1944.

No. 137

PRUDENCE REALIZATION CORPORATION,
Petitioner,

—against—

JOSEPH W. FERRIS, GEORGE L. LONG and HENRY LEIFERT as Trustees under a Declaration of Trust dated as of July 1st, 1938, with respect to 307 West 36th Street (Burnside) First Mortgage Participation Certificates, CITY BANK FARMERS TRUST COMPANY and MARTIN S. LINDGROVE as Trustees under the Last Will and Testament of HERMAN STUTZER, deceased, on behalf of themselves and other holders of certificates in 307 West 36th Street (Burnside) First Mortgage Participation Certificates, SOLOMON ZAUDERER, MILTON KIMMELMAN, IRVING ZAUDERER and CHARLES KIMMELMAN, doing business as KIMMELMAN AND ZAUDERER, on behalf of themselves and all other holders of Prudence Bonds Corporation participating certificate issue, and HUNTER L. DELATOUR, RAYMOND REISLER and JEROME THRALLS, Trustees of Realty Associates Securities Corporation, Debtor, holders of Burnside Certificates,
Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK.

BRIEF ON BEHALF OF RESPONDENTS, CITY BANK FARMERS TRUST COMPANY AND ANOTHER, AS TRUSTEES, ETC.

JOHN ROSS DELAFIELD,
ROBERT McC. MARSH,
EUGENE BLANC, JR.,
Counsel for City Bank Farmers Trust Company and Martin S. Lindgrove, as Trustees, etc., Respondents.

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Supreme Court of the United States

OCTOBER TERM, 1944.

No. 137

PRUDENCE REALIZATION CORPORATION,
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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF NEW YORK.

BRIEF ON BEHALF OF RESPONDENTS, CITY BANK FARMERS TRUST COMPANY AND ANOTHER, AS TRUSTEES, ETC.

OPINIONS BELOW.

The opinion of the Supreme Court, New York County, Additional Special Term, appears at R. 221, 222, but is not officially reported. The opinion of the Appellate Division, First Department, appears at R. 231-233, and is reported in 266 App. Div. 543. The opinion of the Court of Appeals of the State of New York appears at R. 241-251, and is reported in 292 N. Y. 210.

STATEMENT.

The facts were presented by the pleadings (R. 171-219), affidavits (R. 9-142), the deposition of one witness (R. 142-171), and a stipulation of facts (R. 219-221). On petitioner's motion and respondents' cross-motions for summary judgment the lower court held that an issue of fact was presented and denied all motions. On appeal, all parties agreed that no factual issue existed and that all the evidentiary facts were contained in the record. The Appellate Division granted the motion of the present petitioner, holding that its certificates were entitled to parity of treatment with all others, and affirmed the denial of the cross-motions of the present respondents. The Court of Appeals of the State of New York reversed, and granted the cross-motions of the present respondents for summary judgment holding that the certificates held by the petitioner were subordinate.

The facts so presented are as follows:

A.

The Creation of the Certificate Issue.

On June 25, 1927, The Prudence Company, Inc., was the owner of a bond and mortgage in the sum of $1,200,000, made by Burnside Improvement Co., Inc. The bond and mortgage were assigned without consideration by said The Prudence

Company, Inc., to its wholly controlled affiliate, Prudence-Bonds Corporation, pursuant to a scheme whereby Prudence-Bonds Corporation was to issue certificates participating in the bond and mortgage. The holders of such certificates thereby became tenants in common of the bond and mortgage (R. 13). As part of this arrangement, Prudence-Bonds Corporation further assigned the bond and mortgage to The Bank of America, as depositary under a deposit agreement entered into between them at the same time (Ex. A, R. 18-32). The Prudence Company, Inc., then executed an instrument of guaranty, whereby it guaranteed to the owners and holders of the certificates to be issued, the payment of interest on the certificates when due, and the payment of the principal thereof, when due, or within eighteen months thereafter (Ex. C, R. 36-39). Certificates were issued according to the arrangement to various persons, and are now outstanding to the extent of $1,016,000. Of these, $431,212.86 were reacquired, as hereinafter stated, by the guarantor, and are now held by its successor, petitioner Prudence Realization Corporation.

The form of the certificate is shown at Exhibit B, R. 32-35. This is the issue referred to as the "Burnside Issue". The mortgage and the certificates matured by their terms on July 1, 1932 and were not paid (R. 147). The owner had also previously defaulted in paying an installment of principal due in January of 1932.

B.

The Financial Condition of the Guarantor at the time of the Reacquisition by it of the Certificates.

Since one of the arguments in this brief will be that the defaulting guarantor reacquired its certificates under such circumstances that it must be concluded that the reacquisitions were made in connection with its guarantee obligation and as a method of reducing that obligation *pro tanto*, (in direct contrast to the circumstances in *Prudence Realization*

Corporation v. *Geist*) it is necessary to review briefly the financial background against which such reacquisitions must be projected.

As already stated, the Burnside mortgage and certificates matured by their terms on July 1, 1932 and were not paid. The guarantor had a grace period of eighteen months with respect to principal payments only. During the year preceding this maturity, to wit: 1931, the cash position of the guarantor had deteriorated tremendously. Its cash balance as at June 30th, 1931, had been nearly $3,500,000; as at December 31, 1931, it was only $783,738.08. Its other assets as at the same date consisted of marketable securities amounting to only $168,045.25 and note and accounts receivable amounting to $1,563,459.63. The balance of its assets were either pledged assets, or the guarantor's own securities, or those of affiliated companies. (Stipulation, par. 1, R. 219.)

On the other hand, the guarantor was faced during the year 1932 with maturities of mortgage securities guaranteed by it, aggregating $22,791,433, which was an increase of $21,816,333 over the comparatively small total of maturities of $875,100 for the year 1931. Clearly, in view of the increasing defaults by mortgagors, its assets were insufficient to pay these increasing maturities. The pyramiding of its maturities is dramatically shown by the table of maturities of obligations guaranteed by The Prudence Company, Inc., for the eleven years from 1927 to 1937, as follows:

1927	$ 100
1928	1,000
1929	2,600
1930	2,400
1931	875,100
1932	22,791,433
1933	32,488,177
1934	40,162,715
1935	26,230,120
1936	16,096,161
1937	10,676,186

From these figures emerges the inexorable fact that the collapse of the whole structure was inevitable, since the mortgages themselves were admittedly not worth their face amounts. The directors were not blind to this and moved in three directions to stave off the obvious end for as long as possible.

First, in November of 1931, they commenced negotiations for a loan of $25,000,000 from the Reconstruction Finance Corporation. (Stipulation, par. 1, R. 219.) This loan was granted to the extent of $20,000,000 in February of 1932 (R. 154). The guarantor's Assistant Treasurer testified that this loan was necessary "for us to keep on as a going concern" (R. 155). The statements of the Company in its application for this loan are also of the utmost significance. The guarantor stated that $12,000,000 of the amount asked for would be used to "renew maturing mortgages", since the mortgages, if foreclosed, would not bring in enough to pay off the loan:

> "* * * **If we fail to renew selected maturing mortgages which we have guaranteed, the flood of foreclosure actions will necessarily result * * * in loss to investors in first mortgage securities, since their properties when foreclosed will bring only a fraction of the amount originally conservatively loaned thereon.**"

As a second step the guarantor took advantage of the eighteen months grace clause in its guaranty. On January 1, 1932, it notified the holders of the certificates that it had suspended principal payments (R. 145). At the same time, the owner of the premises subject to the Burnside Certificates defaulted in the payment of an installment of principal due in January, 1932, so that the mortgage was technically in default from that time on, although the default could not be then enforced against the guarantor because of the grace clause. On June 13, 1932 the guarantor caused title to the mortgaged premises to be taken by its wholly owned subsidiary, Amalgamated Properties, Inc., which later executed an assignment of rents to the guarantor (R. 159).

The third step taken by the guarantor was to attempt to reduce or postpone its guaranty liabilities by acquiring Burnside Certificates at a discount or exchanging Burnside Certificates for other certificates of later maturities. This proc[illegible] began on March 3rd, 1932, and continued until January 2[illegible]4, 1933 by which time the guarantor had repurchased or re-acquired Burnside Certificates, aggregating $431,212.86 in principal amount (R. 124; Ex. D, R. 40-44). The method used in acquiring certificates will be discussed in detail later, but it should be noted that prior to January 1, 1932, the guarantor had not owned any of the Burnside Certificates (Stipulation, par. 6, R. 220).

On March 4, 1933, the guarantor was taken over by the Superintendent of Banks of the State of New York. In 1935, the debacle so clearly foreseen by the Company occurred and it filed its petition in the Bankruptcy Court, asking for its reorganization under Section 77-B. The United States District Court for the Eastern District of New York approved the petition on February 1, 1935, appointed Trustees, and later adjudicated the guarantor to be insolvent (R. 16).

C.

The Reorganization Proceedings.

Two separate and distinct reorganization proceedings are referred to herein and in the discussion, it is necessary to keep them apart to avoid the confusion which is caused by the failure of petitioner's brief to make this distinction. The reorganization directly involved is that of the Burnside certificate issue. The one which is only indirectly involved is that of the guarantor, The Prudence Company, Inc. These two reorganization proceedings were not consolidated, and in this respect, this case differs from *Prudence Realization Corporation* v. *Geist*, 316 U. S. 89, in which the Court stated at page 92:

> "The present proceeding was begun by respondent's petition in the *consolidated* reorganization of Prudence Company and Amalgamated Properties in the Eastern District of New York * * *."

The factual situation here with respect to these separate proceedings is set forth in paragraph 4 of the stipulation herein (R. 220), which reads as follows:

> "4: The proceedings for the reorganization of Amalgamated Properties, Inc., under Section 77B of the Bankruptcy Act, were never consolidated with the above mentioned proceedings for the reorganization of The Prudence Company, Inc., but the petition for the reorganization of Amalgamated Properties, Inc. as a subsidiary of The Prudence Company, Inc. was filed in the proceedings for the reorganization of The Prudence Company, Inc., and on April 22, 1938, an order was made by the United States District Court, for the Eastern District of New York, severing the proceedings for the reorganization of Amalgamated Properties, Inc. from the proceedings for the reorganization of The Prudence Company, Inc."

The opinion of the Court of Appeals in this case clearly differentiates between the two reorganizations (R. 241-242).

1. The reorganization of the Burnside certificate issue.

We are primarily concerned with the reorganization of the Burnside issue in the proceedings filed by Amalgamated Properties, Inc., a wholly owned subsidiary of the guarantor, used by it for the purpose of taking title to the properties, subject to the defaulted mortgages in which certificates had been issued. In this way Amalgamated Properties, Inc., obtained title to the property subject to the Burnside issue of certificates, and numerous others.

On March 16, 1936, Amalgamated Properties, Inc., filed a petition for its reorganization in the United States District Court for the Eastern District of New York as a part of the then pending reorganization of the guarantor, under the

procedure then permitted by Section 77-B of the Bankruptcy Act (R. 125). Later, however, the Amalgamated Properties proceeding was severed from the reorganization proceeding of the guarantor and the two proceedings thereafter were conducted independently of each other (Stipulation, par. 4; R. 220). As already mentioned this is different from *Prudence Realization Corporation* v. *Geist*.

In this reorganization, a separate plan was proposed for each certificate issue (R. 125-126). In accordance with this practice, a separate plan was proposed for the Burnside issue and was ultimately confirmed (R. 93-122). This plan provided, in substance, that the mortgage in which the certificates participated was to be assigned to trustees and then extended and modified. Such assignment was made and respondents are now such trustees with all rights of an owner of the mortgage (R. 100). The property subject to the mortgage was also to be conveyed to these same trustees without a merger of the mortgage and the fee (R. 97). The certificates were modified to conform to the plan (R. 102), and the rights of the holders thereof were changed from those of tenants in common of the mortgage to those of beneficiaries of a trust. Section 1, Part VI, of the Plan (R. 102) provides that all holders of certificates shall assign to the trustees, their rights and interests as owners of shares in the mortgage and shall receive, "in lieu thereof, rights as beneficiaries of the trust of said certificated bond and mortgage in accordance with the provision of this Plan, and said certificates shall thenceforth evidence the extent of their interests as such beneficiaries".

The guarantor, through its 77-B Trustees, filed a claim in the Amalgamated proceeding based on the Burnside certificates acquired by it as aforesaid. The point was raised that the guarantor, having defaulted, was not entitled to participate in the mortgage on a parity with the other holders of certificates whose claims it had guaranteed and not paid. It was provided in the Burnside plan that this question should be reserved for future determination and that no interest should be paid on the Burnside certificates re-acquired by the guarantor.

> "* * * unless and until it shall have been finally adjudicated by a Court of competent jurisdiction whether or not The Prudence Company, Inc., or its Trustees or their successors or assigns are entitled to receive such cash, or other property, or securities and to share in the proceeds of the property to be assigned to the Trustee pursuant to the Plan, and on a parity with other Certificate-holders or otherwise" (R. 121).

Pending such adjudication, the trustees are to hold in escrow the interest otherwise payable on the so-called "Prudence-owned Certificates" (R. 120-121).

Beyond that, the Plan itself also provided for the treatment to be accorded to the certificates in the event of subordination, which treatment is much more favorable to the guarantor than that which would follow as a matter of law. If the adjudication is to the effect that such certificates are subordinate, then one-half of the interest otherwise payable thereon is to be paid into a sinking fund for the retirement of certificates, and the other half is to be distributed as additional interest on the publicly-held certificates (R. 121-122).

Thus the reservations were obviously inserted not solely to expedite the closing of the case, as claimed by petitioner (petitioner's brief, pp. 2, 6) but in order to give the guarantor a more favorable position in the event of subordination, in return for its consent to such subordination in advance even if subordination should constitute the guarantor a separate class of creditors.

These provisions of the plan constitute as a matter of agreement a complete disposition of the money allocable to the guarantor's certificates and are entirely different from the simple reservation in the *Geist* case which was inserted by the Judge in the order confirming the plan and was not a part of the bargain embodied in the plan. Moreover, as will later appear, the latter was only a reservation of bankruptcy jurisdiction to try a bankruptcy question then pending before the bankruptcy court, not, as is the Burnside reservation, a complete saving of the status quo coupled with a termination of bankruptcy jurisdiction.

The Burnside plan contained two other reservations. These were an express reservation of all rights of action against the guarantor (R. 97), and the following in Part IX, paragraph 5 (R. 106):

> "* * * the certificate-holders hereby expressly reserve any and all rights which they may have against said guarantor or guarantors by reason of any breach of any such guaranty or guaranties."

The plan of reorganization for the Burnside certificate issue was duly accepted in writing by the 77-B Trustees of the guarantor in the manner prescribed by the Bankruptcy Act (Stipulation, par. 3, R. 220). Thus, the guarantor expressly became a party to the agreement and accepted its benefits in lieu of its distributive rights under the bankruptcy law. Petitioner, Prudence Realization Corporation, is merely the successor of the guarantor, being, in effect, no more than a transferee of the assets at a bankruptcy sale.

The Burnside plan was duly confirmed and consummated and is now in effect (R. 93-122).

The reorganization proceeding has been terminated by appropriate final order and none of the present parties is or ever has been in bankruptcy (R. 130-131).

As stated, we are only secondarily concerned with any reorganization other than that of the Burnside issue. Yet, since petitioner's brief has involved the guarantor's reorganization, that proceeding must be clearly defined, if only to show its relative unimportance.

2. The reorganization of the guarantor.

After the guarantor was declared insolvent, a plan of reorganization was approved by the District Court, the effect of which was to transfer to petitioner all its assets for liquidation (R. 16). The liquidation however, was to take place outside the bankruptcy court and apart from, and after the termination of, bankruptcy jurisdiction. Actual distribution was to be made neither in bankruptcy nor according to the

bankruptcy rule, but by petitioner as a New York corporation under the terms of an agreement with the creditors, *i.e.* the reorganization plan.

Among the assets so transferred to petitioner were the Burnside certificates aggregating $431,212.86 in principal amount. Holders of certificates and other guaranteed securities filed claims in that proceeding, based on the guaranty. Petitioner's predecessor, however, filed no claim in this proceeding. (Stipulation, par. 5, R. 220.) Such guaranty claims were unsecured claims in bankruptcy *simpliciter* and hence were required to be allowed to the full extent thereof. (See *Ivanhoe Building & Loan Association v. Orr*, 295 U. S. 243.) The plan itself however, changed this and treated them as claims secured by "Collateral" (R. 49). It provided for their reduction by the "New Loan Value" of the mortgaged property underlying the certificates to which the guaranty attached (R. 51-52, 59-60). The "New Loan Value" of such property or "Collateral" was to be fixed according to a formula in the plan (R. 66-69).

The actual distribution of the amounts realized on the assets of the bankrupt (after their transfer to petitioner) was thus not to be made to creditors in accordance with the Bankruptcy Law, but outside of bankruptcy and in accordance with an agreement incorporated in the plan itself, which agreement treated the guaranty holders as secured creditors (R. 59-61), and approximated the method adopted in reorganizations of mortgage and guaranty companies in the Courts of New York. Neither the plan nor the order confirming it attempted to fix or adjudicate the value of the assets so transferred, among which were the Burnside certificates acquired by the guarantor as aforesaid. The plan, however, recognized specifically that the question of the parity of these certificates had been raised and that if it were decided adversely to the guarantor, the value of the Burnside certificates as an asset of the bankrupt would be less. It accordingly provided that if there should be

> "uncertainty whether certificates of such issue held in the Debtor's estate on the Effective Date are on a parity with other certificates of such issue, the deduction to be made pursuant to the foregoing clause (1) shall be based in the first instance on the assumption that the certificates so held in the Debtor's estate are not entitled to parity, and an appropriate reserve shall be established by the New Company to provide for the additional distribution to be made to certificate holders of such issue if the Board of Directors shall be later satisfied that such parity exists; the Board of Directors being authorized to discontinue such reserve if and when satisfied that such parity does not exist; * * *" (R. 60).

The reference to the "Debtor" in the foregoing quotation means the guarantor, The Prudence Company, Inc., and the reference to the "New Company" means the present petitioner.

The plan also recognized that many of the certificate holders had dealt, or would deal, with their certificates and the underlying mortgages in separate reorganizations thereof. It was feared that such dealings might affect their rights to participate in the plan, and in order to prevent such a result and to anticipate the argument that such dealings might constitute a waiver of claims, such as the claim to subordinate the guarantor's certificates, the certificate-holders required the inclusion in the guarantor's plan of a provision that unless a guaranty claim should have been expressly withdrawn, released, compromised or expunged,

> "* * * no action taken subsequent to February 1, 1935, by or on behalf of any holder of a guarantee claim against the Debtor with respect to his Collateral shall bar any such claimant from participating in the benefits of the Plan to the extent herein provided" (R. 66).

The reference to "Collateral" means the mortgage underlying the certificate issue, and it will be recalled that February 1, 1935 is the date of the approval of the guarantor's petition for reorganization in bankruptcy.

The District Court's order confirming the guarantor's plan of reorganization further recognized that equities in favor of third persons might exist, and accordingly when it directed the transfer of the assets to petitioner it provided as follows (R. 82):

> "The Section 77-B Trustee of the Debtor is hereby further directed to transfer to the New Company forthwith, subject to all then existing equities and rights of third parties therein, all assets held by said Section 77-B Trustee for the account of others or held by said Section 77-B Trustee in any agency or other segregated account, pending settlement or determination of equities or rights asserted by others. * * *"

This proceeding has also been terminated by an appropriate final order, and petitioner is functioning as an independent New York corporation, which has never been in bankruptcy.

SUMMARY OF ARGUMENT.

POINT I. No bankruptcy or other Federal question is presented.

POINT II. Petitioner's certificates were subordinated by the terms of a contract construed in accordance with the state law as laid down by its highest court.

POINT III. Relative rights in the local real estate and in the mortgage thereon created by local law were preserved by the reservations in the reorganization plans.

POINT IV. Prudence Realization Corporation v. Geist does not require a different result since the reservations were entirely different.

POINT V. Opinion of the New York Court of Appeals follows the view above outlined and does not result in either lack of uniformity or improper preference.

POINT VI. In any event Prudence Realization Corporation v. Geist requires subordination of the certificates acquired by the defaulting guarantor under the circumstances of the present case.

POINT VII. The State Court properly decided a question of local law and its judgment should be affirmed.

ARGUMENT.

POINT I.

NO BANKRUPTCY OR OTHER FEDERAL QUESTION IS PRESENTED.

None of the parties to the present proceeding is or ever has been in bankruptcy or in reorganization under the Bankruptcy Act. The trusts of the New York real estate under which the respondents Ferris, et al., hold the real property and the mortgage thereon were created by virtue of a reorganization plan, but the proceeding in which such plan is adopted has been finally closed by an appropriate order and all bankruptcy jurisdiction has finally terminated.

Petitioner argues (p. 7 of its brief) that such closing was solely for the purposes of an agreement between Amalgamated and a creditor, but the true reason would seem to be that the job of the reorganization court was finished and the necessity for bankruptcy jurisdiction had ceased. Nevertheless, the proceeding was completely closed, as petitioner says, for all purposes, even if this operates, as respondents claim, against petitioner's present purposes.

All the elements involved in the reorganization have therefore weighed anchor, cast off their ties to the bankruptcy, and started out afresh without any further connection with the bankruptcy court. The charter which dictates the course thereafter to be followed is the plan of reorganization, which is an agreement among the creditors made binding upon dissenters, if any, by the order of confirmation. The question presented is one of the construction of this agreement and of contracts which are its subject matter. This is not a bankruptcy question. It is clearly a question of local law.

Erie Railroad Co. v. *Tompkins*, 304 U. S. 64, 78;
Ruhlin v. *New York Life Insurance Co.*, 304 U. S. 202-205.

The requirement of equality of distribution applies only to bankruptcy *simpliciter*. It does not apply to distributions made under a plan of reorganization, where the only requirement is that the *plan* shall be fair and equitable. The court has found that the Burnside plan is fair and equitable, and that finding may not now be collaterally attacked when no question of bankruptcy distribution is involved.

Petitioner's argument in its broadest aspects (see especially p. 14, first paragraph, of petitioner's brief) would mean that any question ever arising under a plan of reorganization, or affecting reorganized property, would have to be determined by reference to the bankruptcy law and bankruptcy standards, even after a complete termination of the bankruptcy proceeding and the end of bankruptcy jurisdiction. In another aspect, and as a consequence of its argument, petitioner's interpretation of this Court's decision in *Prudence Realization Corporation* v. *Geist* would mean that the question of subordination has been forever foreclosed, and that there are no circumstances under which there could be subordination against a bankrupt guarantor. Such, we submit, is not the law, but is, on the contrary, the *reductio ad absurdum* of petitioner's argument.

POINT II.

PETITIONER'S CERTIFICATES WERE SUBORDINATED BY THE TERMS OF A CONTRACT CONSTRUED IN ACCORDANCE WITH THE STATE LAW AS LAID DOWN BY ITS HIGHEST COURT.

The subject matter of the present proceeding is local real estate, interests therein, and liens thereon, which is by both tradition and authority the proper concern of local courts. The real estate against which the liens are asserted by the petitioner, and whose priority is disputed by the respondents, is physically situated within New York. The mortgage on this real estate and the participating interests therein were created in New York, and exist by virtue of its local law.

The trust interests, into which the mortgage interests were transmuted by the reorganization plan, exist only by virtue of the New York statute (N. Y. Real Property Law § 96), and the trustees respondents are accountable only to the Supreme Court of the State of New York. The purpose of this proceeding is to determine the relative rights in New York real estate (or the proceeds thereof) held for the satisfaction of a New York mortgage.

All the events upon which the New York courts rely to work a subordination had transpired prior to the bankruptcy, which occurred on February 1, 1935:

1. The execution of the guaranty and the depositary agreement, and the issue of certificates took place in 1925;

2. The default in the payment of an installment of principal due on the mortgage underlying the certificates occurred in January, 1932;

3. The invocation by the guarantor of the eighteen months' grace clause with respect to principal payments took place on January 1, 1932;

4. Both the certificates and the underlying mortgage matured on July 1, 1932, and were not paid;

5. The guarantor reacquired the defaulted securities during the period from March 3rd, 1932 to January 23, 1933; and

6. The eighteen months grace clause expired on July 1, 1933 and neither the mortgage nor the certificates were paid.

Thus, long before the Bankruptcy Act could apply, or bankruptcy or any other Federal jurisdiction attach, a whole congeries of rights and liabilities had come into existence among the guarantor, the certificate holders in the Burnside issue, certificate holders in other issues, and other creditors of the guarantor. These relations and the interpretation of the contracts giving rise to them, were necessarily governed

by state law. No other law was applicable, and they could not be ascertained or defined by reference to any other system of law except that of New York State. The reacquired certificates had become, if subordinated, in effect a second lien on the mortgaged property. Had this proceeding or some other appropriate proceeding been instituted at that time, whether in the state court, or in a Federal court by virtue of diversity jurisdiction, subordination would have been decreed. The decisions of the New York Court of Appeals are clear.

Matter of Lawyers Title & Guaranty Co., 287 N. Y. 264;
Matter of People, 285 N. Y. 337;
Pink v. *Thomas*, 282 N. Y. 10;
Matter of Title & Mortgage Guaranty Co., 275 N. Y. 347;
Title Guarantee & Trust Co. v. *Mortgage Commission*, 273 N. Y. 415;
Matter of Lawyers Mortgage Co., 272 N. Y. 554;
Matter of N. Y. Title & Mortgage Co., 272 N. Y. 556.

These decisions have established a rule of law with such definiteness and finality as to constitute it a local rule of property, action or conduct which the Federal courts will recognize and enforce.

Petitioner, moreover, does not contend in this Court that the reacquired certificates are not subordinate as a matter of local law. Indeed, that question is not now before this Court or within the petitioner's assignment of errors. Petitioner's contention is that something has occurred in the bankruptcy proceedings which, despite *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, *Wichita Royalty Co.* v. *City National Bank, et al.*, 306 U. S. 103, 107, and *Moore* v. *Illinois Central Railroad Co.*, 312 U. S. 630, 633, requires that this Court ignore the local real estate rules and substitute a concept applicable, at best, only to bankruptcy *simpliciter*, as distinguished from corporate reorganization in the bankruptcy court.

Since corporate reorganization in the bankruptcy court is a process of preservation or adjustment, by mutual agreement, of rights created under the local law, a plan may properly provide for the preservation of a status or for the adjudication at some future date, of existing relative rights and liabilities, and as we shall show in the next point, this is exactly what the Burnside plan of reorganization did.

POINT III.

THE RELATIVE RIGHTS IN THE LOCAL REAL ESTATE AND IN THE MORTGAGE THEREON CREATED BY LOCAL LAW WERE PRESERVED BY THE RESERVATIONS IN THE REORGANIZATION PLAN.

The Burnside plan, as already stated, contained three reservations. The first was a reservation of all rights of action against the guarantor (R. 97), the second was a reservation by the certificate holders of "any and all rights which they may have against said guarantor or guarantors by reason of any breach of such guaranty or guaranties" (R. 106), and the third and most important was a reservation of the entire question of parity contained in the amendment to the plan (R. 120-122). Although petitioner argues to the contrary, the fact is that this latter reservation is entirely different from the reservation in the *Geist* case. As heretofore stated, this reservation included a complete agreement as to the disposition of the moneys allocable to the certificates repurchased by the defaulting guarantor, and obtained for the guarantor a treatment more favorable than would have been accorded to the guarantor had the certificates been subordinated in bankruptcy *simpliciter*, as distinguished from corporate reorganization in the bankruptcy court. Petitioner's brief has stated in several places, *e.g.*, pages 2, 6 and 18, that the reservation was inserted solely to avoid delay in consummating the plan. This statement has no support in the record, and may at best be treated only as argument of counsel, but as such argument it is completely erroneous,

for it is clear that from the point of view of the guarantor, the reservation was inserted so as to enable the guarantor to obtain this better treatment in the event of subordination. From the point of view of the certificate holders, subordination might have caused the holders of the subordinated certificates to become a separate class of creditors whose separate consent to the plan would have been needed. By the reservation inserted as part of the bargain incorporated in the plan, and approved by the District Court, the guarantor consented in advance to a possible subordination, thus avoiding for the certificate holders the difficulty of obtaining its consent as a separate class in return for their granting to the guarantor a more favorable treatment for its subordinated certificates.

To the extent that the guarantor's plan of reorganization may be important, it is to be noted that closely correlated with these reservations in the Burnside plan were the two reservations in the guarantor's plan of reorganization, to wit, the establishment of a reserve on the assumption that parity did not exist in the event that the question were raised with respect to any particular issue (R. 60), and the reservation (R. 66) that no action taken by the holder of a guaranty claim in dealing with the mortgage and real property underlying his certificate should affect his right to participate in the guarantor's plan.

Finally, the order directing the transfer of assets from the guarantor to the present petitioner specifically provided that those assets were to be transferred subject to all "existing equities and rights of third parties". (Order of confirmation, par. 20, R. 82.)

Petitioner is therefore no more than a transferee of such assets at a bankruptcy sale, and hence can acquire no greater rights than the bankrupt had.

Smith v. *Chase National Bank of the City of New York*, 84 F. (2d) 608;

In re Moose River Lumber Co., 251 Fed. 409;

Matter of Lawyers Title & Guaranty Co., 287 N. Y. 264, 273 (*supra*).

It is to be noted that the reservation of the question of parity in the Burnside plan extended expressly to "The Prudence Company, Inc., or its trustees or their successors or assigns" (R. 121), and hence is binding upon the petitioner, which is a successor or assign.

Nothing in either of the bankruptcy reorganization proceedings purported to adjudicate either the value or the priority of lien of the reacquired certificates or the relative rights and priorities between the certificate holders and the guarantor. Those reacquired certificates were a claimed asset of the guarantor, and petitioner, as the guarantor's successor, is clearly entitled to realize upon them for whatever they may be worth. Having acquired them, however, subject to the agreement in the Burnside plan, whereby a more favorable treatment was accorded to it in return for its concession to consent in advance in the event of subordination, it may not now argue that subordination is not permitted by virtue of the plan itself. The reservations must mean that the court of competent jurisdiction is to determine the relations existing between the guarantor on the one hand and other certificate holders on the other hand, as they existed either immediately prior to, or regardless of the bankruptcy and unaffected and unaltered thereby. Unless this be true, the reservations mean nothing at all, or, as the Court of Appeals said, the Burnside plan must be modified. In other words, it was recognized in arriving at the bargain which constitutes the reorganization plan, that prior to the bankruptcy, the certificate holders stood in a certain relation to the guarantor, and the guarantor's reacquired certificates had a certain standing as to priority of lien. All this could have been adjudicated prior to the bankruptcy as a matter of state law, or it might have been adjudicated during the course of the bankruptcy in the state courts by permission or direction of the bankruptcy court.

Thompson v. *Magnolia Petroleum Co.*, 309 U. S. 478, 483.

Hence, one of the reservations in the guarantor's plan significantly chose February 1, 1935, the date of the approval of the petition. Clearly, the intent and the effect of the reservations in the Burnside plan were to carry the entire set of relations through the bankruptcy proceedings intact, so that they emerged from the bankruptcy after the final orders in exactly the same condition as when they entered, with each party able to make the same claims that would have been possible without the bankruptcy but with neither party able to make a stronger claim, merely by reason of the bankruptcy.

With respect to these relations, the period of the bankruptcy was an episode which left them unaffected, so that when the reorganized enterprise was launched anew, with no ties to the bankruptcy court, it necessarily resumed its course upon and was governed by the current of the state decisions.

Any other interpretation of the reservations will render a large portion of the plans nugatory and, despite the agreements contained in the plan, despite the consent of the guarantor, and despite the approval of the plan by the District Court, will give to petitioner as successor to the defaulting guarantor a much higher position than the guarantor itself occupied.

POINT IV.

PRUDENCE REALIZATION CORPORATION v. GEIST DOES NOT REQUIRE A DIFFERENT RESULT, SINCE THE RESERVATIONS WERE ENTIRELY DIFFERENT.

Petitioner's counsel has stated, at the bottom of page 7 of its brief, that the parity question "had been reserved in the Zo-Gale Plan" which was involved in the *Geist* case. The record will show that this is not accurate and that the reservation was not contained in the plan but solely in the order confirming the plan. Petitioner tends to correct this statement at page 11 of its brief, but the tabular comparison contained at pages 16-17 of the brief is again inaccurate in

that it fails to include the complete bargain that was made in the Burnside case. This difference between the two reservations is of the utmost significance.

The bargain arrived at in the Zo-Gale Plan, on its face, gave parity to the guarantor. The bargain in the Burnside plan did not—on the contrary, it specifically contemplated a possible subordination and provided for the results that would follow. At the time of the confirmation of the Zo-Gale Plan, Geist, the Trustee, felt that the plan had left open the question of the effect of the bankruptcy on the right of the guarantor to share. Accordingly, he applied to the bankruptcy court in the bankruptcy proceeding (which was considered by this Court a consolidated proceeding of Prudence and Amalgamated [316 U. S., at p. 92]), for an order fixing the distributive rights of the claimants in bankruptcy. The Court, wishing to confirm the plan and yet retain its exclusive jurisdiction to determine that bankruptcy question, inserted the reservation *of jurisdiction* in its order of confirmation, and the same reservation *of jurisdiction* is found in the final order closing the Amalgamated reorganization as a whole. Thus, in the *Geist* case, there was no bargain as to the effect of subordination, the reservation was not a reservation *of status* or of relative positions as a part of the plan, and had not been bargained for by the certificate holders as a part of the consideration for their consents thereto. The reservation was a reservation of bankruptcy jurisdiction contained solely in the order confirming the plan after the consents had been filed, and there could be therefore no provisions such as are found in the Burnside plan for the treatment of the certificates after the adjudication of the reserved question, which differed as a matter of agreement from the bankruptcy rule of distribution. The question presented in the *Geist* case was the strictly legal one of the rights to which the guarantor was entitled as a matter of bankruptcy distribution in the consolidated bankruptcies of Prudence and Amalgamated. Exclusive jurisdiction to determine that question was reserved by the bankruptcy court itself, in its own order for determination by it, in, and as

part of, the bankruptcy proceeding then pending before it. Distribution was ultimately to be made not in accordance with any agreement but "in accordance with the final adjudication of such court" (R. 127). Thus, in deciding the question of bankruptcy distribution in the bankruptcy court, the bankruptcy rule necessarily applied.

The question in the present case, however, is, by force of different reservations, one of substantive rights, for the reservation in the Burnside plan was not a reservation of bankruptcy jurisdiction—that jurisdiction was completely terminated without qualification by the final order closing the case—but it was a reservation for the purpose of preserving unaffected by the bankruptcy, a status, a group of relations, which existed independently of the bankruptcy and were governed solely by state law, and it was coupled with a complete termination of bankruptcy jurisdiction.

Accordingly, petitioner is not correct in the assumption on page 17 of its brief that the only two factual variations between the *Geist* case and the present case are the selection of the Federal forum in the former and the state tribunal in the latter, and the continuation of the proceeding in the one case and its termination in the other. The difference lies in the very substance and nature of the reservation itself.

POINT V.

THE OPINION OF THE NEW YORK COURT OF APPEALS FOLLOWS THE VIEW ABOVE OUTLINED AND DOES NOT RESULT IN EITHER LACK OF UNIFORMITY OR IMPROPER PREFERENCE.

The Court of Appeals reveiwed the Burnside reorganization, noted the termination of the bankruptcy proceeding and the end of bankruptcy jurisdiction, and considered the effect of the reservations in the Burnside plan. It then correctly found that neither the plan nor any order in the proceeding purported to adjudicate or affect the relative rights and priorities in the local real estate. Petitioner's argument, at page

15 of its brief, distorts the state court's meaning when it attempts to point out that the question could not be determined "unaffected by the reorganization", because the plan changed the disposition of income to "a basis wholly inconsistent with state law". This change, so beneficial to the guarantor, was made, however, as a matter of agreement in the plan, and did not result from the operation of the bankruptcy law. Thus, the true meaning of the state court's language is clear.

Having found no agreement or order modifying the relative rights of the certificate holders and having correctly held that in a corporate reorganization rights remain unaffected unless acted upon by the plan or an order in the proceeding, the state court held that the relative rights of certificate holders had been unaffected, and in this suit for a determination thereof it was faced with the question of defining and determining those relative rights as a matter of its own substantive law.

In order to do this, the Court made an elaborate and detailed examination of all the relevant documents and the surrounding circumstances in order to ascertain the intent of the parties, as shown in the contracts which gave rise to the relations among them. It examined the instrument of guaranty, it analyzed the deposit agreement, and it considered the provisions of the certificates. These are the documents which evidence the contractual relations among the certificate holders. It considered in detail the circumstances surrounding the creation of the certificate issue and the reacquisition of the certificates by petitioner.

It then came to the conclusion that there was an actual intent clearly evidenced in these documents to grant priority to certificate holders in the event of a reacquisition by the guarantor after default. This is the "visible evidence" to which this Court referred in the *Geist* case, 316 U. S., at page 94. Whatever may have been the basis of any of the other decisions of the New York Court of Appeals in cases involving the parity question, it is clear that in this case the Court of Appeals relied directly upon a construction of the docu-

ments to find the actual intent of the parties. The conclusion was not rested upon any presumed intent or any so-called natural or special equities.

On the question of the construction of contracts, the state law is binding.

> "The subject [i.e., the construction of contracts] is now to be governed, even in the absence of state statute, by the decisions of the appropriate state court. The doctrine applies though the question of construction arises not in an action at law, but in a suit in equity."
>
> *Ruhlin* v. *New York Life Insurance Co.*, 304 U. S. 202, 205.

Petitioner, at pages 22-24 of its brief, argues the question of construction, but it must be clear that, insofar as petitioner bases its position on a claim that the state court wrongly construed the contract, the position is untenable.

Petitioner also argues that the result of following the local state rule would contravene the bankruptcy principle of uniformity, but here again petitioner confuses the issue, for if the question is one of the construction of a contract or any other proper subject matter of local concern, then the fact that different local courts arrive at different results is merely "a permissible difference of opinion in the state courts" (*Ruhlin* v. *New York Life Insurance Co.*, (*supra*) at p. 206), and is not a violation of the bankruptcy principle of uniformity.

> *Hanover National Bank* v. *Moyses*, 186 U. S. 181, 190;
>
> *Thompson* v. *Magnolia Petroleum Co.*, 309 U. S. (*supra*) at page 483;
>
> *Stellwagen* v. *Clum*, 245 U. S. 605, 613.

The reorganization court will recognize and enforce contracts among creditors providing for or resulting in, subordination.

St. Louis Union Trust Co. v. *Champion Shoe Machine Co.*, 109 F. (2d) 313 (C. C. A., 8th, 1940).

Petitioner has also argued that subordination is but a local rule of distribution in the handling of insolvent estates. Since the Court of Appeals decision was based squarely upon the construction of the contract, the argument is inapplicable in this case. Moreover, the Court of Appeals has itself destroyed any basis for such argument by pointing out that it was dealing neither with a bankruptcy nor a state liquidation proceeding, but with a suit between parties, none of whom had ever been in bankruptcy and none of whom was being liquidated, and the purpose of which was "to determine relative rights in property held for the satisfaction of a mortgage". 292 N. Y., at page 215 (R. 242).

Further, the principle that a surety may not be repaid in whole or in part until he has completely discharged his obligation to his creditors, i.e., that he may not have "partial subrogation" is firmly established in the law of New York.

Hanlon v. *Union Bank*, 247 N. Y. 389;
McGrath v. *Carnegie Trust Co.*, 221 N. Y. 92, 95.

This rule, as this Court itself recognized in the *Geist* case, is "applied by the Federal courts in liquidation proceedings under Federal statutes".

Prudence Realization Corporation v. *Geist*, 316 U. S. (*supra*) at page 96;
United States v. *National Surety Company*, 254 U. S. 73, 76;
Jenkins v. *National Surety Co.*, 277 U. S. 258;
American Surety Co. v. *Electric Co.*, 296 U. S. 133.

The rule has been applied in bankruptcy, to this very guarantor, of which the petitioner is the successor:

> "The Prudence Company that guaranteed the debt is seeking to realize upon the collateral before paying off the whole of the obligation to secure which the collateral was given. This is contrary to the established rule in cases of subrogation."
>
> *In re Prudence Bonds Corporation*, 102 F. (2d) 531, 534 (C. C. A., 2d, 1939).

Finally, petitioner has argued that a preference will be created in the event of subordination.

In dealing with this question of preference, petitioner's brief does not dispel an existing confusion, since it fails to differentiate here between the two bankruptcies. While such differentiation may not have been necessary in the *Geist* case, where this Court considered the proceeding as a consolidated proceeding of Prudence and Amalgamated, such differentiation is essential here, where the record specifically points out that there was no such consolidation and that the two proceedings were separate after the order of severance. The first point therefore is to ascertain in which proceeding a preference can be claimed. Further, it must be borne in mind that these are proceedings for corporate reorganization as distinguished from bankruptcy *simpliciter*, so that it might well be possible for a plan to recognize an existing preference in return for some other concession which would move the judge to declare, as he has in both the reorganizations referred to herein, that the plans are fair and equitable. Obviously, such a ruling cannot be collaterally attacked at this point.

As emphasized throughout this brief, we are concerned primarily only with the reorganization of the Burnside issue. Surely, it cannot be claimed that with respect to that reorganization subordination would create a preference, as argued by the petitioners at pages 28-32 of its brief, or would violate the rule of pro rata distribution of an insolvent estate. This is clear because the plan itself contemplated possible subordination and as a matter of agreement gave the guarantor a better treatment for its subordinated certificates than would otherwise have been accorded to it. This

bargain was approved by the judge in charge of the reorganization as fair and equitable. The guarantor, having specifically consented to this plan by express permission of the District Court (Stip., par. 3, R. 220), petitioner as its successor may not now be heard to say, when the possibility of subordination has become a fact, that an improper preference is being granted to one group of creditors of Amalgamated. For a court so to hold, it would have to modify the Burnside plan and overthrow the finding of fairness and equitableness.

With respect to the reorganization of the guarantor, if that is germane, it again seems difficult to see how a preference can occur. Surely, petitioner cannot mean a preference as defined in Section 60 of the Bankruptcy Act (U. S. Code, Title 11, Chap. 6, Sec. 96), since that means a transfer made by an insolvent debtor within four months of the filing of a petition. No such transfer appears. Again, the claim cannot be made that the possibility of subordination was not foreseen by the District Judge, since there was a provision in the plan of the guarantor itself providing for the setting up of reserve funds in the case of subordination, and petitioner took the assets under an order which transferred them subject to existing equities and rights of third persons. These provisions were likewise approved as fair and equitable by the District Judge, who was the same Judge as the one who approved the subordination provisions of the Burnside plan. Nor can it be argued that subordination causes unequal distributions by the petitioner, for the distributions are required by the plan to be made ratably out of the proceeds of whatever assets have been realized upon, and the guarantor never filed any claim as a creditor against itself in the proceedings for the reorganization of The Prudence Company, Inc. (Stipulation, par. 5, R. 220).

The reacquired certificates were assets of the bankrupt, to be liquidated by petitioner for whatever their value might be. If, by reason of subordination as a matter of substantive state law, their value was reduced, petitioner will realize less, but whatever the value, the asset, when liquidated, will be shared equally and ratably by all creditors of the guarantor,

without preference or priority in favor of the certificate holders in the Burnside or any other issue.

Petitioner has also urged that a preference may result from subordination because in bankruptcy the guaranty claims must be allowed in full. In state rehabilitation proceedings, it argues, the guarantee claimants are treated as secured and required to reduce their claims, so that subordination of reacquired certificates is there equitable, but such equity disappears in bankruptcy. However, the plan under which the petitioner holds title to the reacquired certificates, provides that the guaranty claims (although technically allowed in full) must be treated as secured and reduced by the value of the security. The basis of the argument is thus destroyed by the agreement reached in the Plan and although the lien position of the Burnside certificate holders is improved by subordination, their claims in the general assets of the guarantor suffer by the reduction, and this reduction operates to the general benefit, equally and ratably, of all creditors of the guarantor. Petitioner may not have the benefits of both the reduction in the claims *because* of the security, and also the full benefit of the security itself.

Even if subordination, and the results which flow from it as a matter of law, might be said to create a preference in bankruptcy *simpliciter* as distinguished from corporate reorganization in the Bankruptcy Court, such legal results have been prevented from occurring by reason of the agreement in the reorganization plan which provides otherwise. The Burnside plan provides that if there should be subordination, the money otherwise allocable to the subordinated certificates shall be divided between additional interest on non-subordinated certificates, and a sinking fund for the purchase of such certificates. Such provisions were not in the Zo-Gale plan considered in the *Geist* case, in which the results of subordination would follow strictly as a matter of law. The Burnside plan prevents these results. The operation of the sinking fund will more quickly reduce the senior lien and thus enhance the value of the subordinated certi-

ficates and at the same time reduce the participation of the Burnside certificate holders in petitioner's assets. Indeed, subordination may permit the non-subordinated certificates to be paid in full from the mortgaged property which would completely eliminate any claims on the guarantee and thus actually benefit the other creditors of petitioner. Since the guarantor accepted these beneficial provisions, petitioner, as its successor, may not urge as a reason against subordination, a preference which can be created only in their absence.

POINT VI.

IN ANY EVENT, PRUDENCE REALIZATION CORPORATION v. GEIST, REQUIRES SUBORDINATION OF THE CERTIFICATES ACQUIRED BY THE DEFAULTING GUARANTOR UNDER THE CIRCUMSTANCES OF THE PRESENT CASE.

Prudence Realization Corporation v. *Geist* held that where an "equitable basis for requiring the surety or guarantor to postpone the assertion of rights which it derives from or are incidental to his suretyship, to the rights of creditors whom he has undertaken to secure, is wanting", the guarantor may share on a parity with such creditors in distributions in bankruptcy. 316 U. S. (*supra*) at page 96. This is surely nothing new or novel, and was not treated as such by the Court. On the contrary, it was treated as perfectly consistent with the well established cases cited therein such as *United States* v. *National Surety Company*, 254 U. S. 73, and *Jenkins* v. *National Surety Company*, 277 U. S. 258, which recognized the equitable doctrine that a guarantor may not ordinarily compete with creditors whose claims it has guaranteed, in seeking distributions from the estate of the insolvent principal.

The *Geist* case allowed Prudence Realization Corporation parity with respect to an unissued or "uncertificated" part of the mortgage therein involved, amounting to $7,200, and also

with respect to reacquired certificates totalling $816.67. The Court found that the guarantor had not acquired its interests in the mortgage as an "incident" to the guarantee and its rights were not "those of a subrogee". With respect to the $7,200 unissued part of the mortgage, this was obviously and necessarily true, since the guarantor's rights were residual rights in the mortgage, acquired when it made the original mortgage loan, and even prior to its execution of the instrument of guaranty.

With respect to the $816.67 of repurchased certificates, the Court's finding was just as clearly required by the specific admission in the record before it, that the certificates were purchased as investments in the regular course of business. In the *Geist* proceeding, Prudence Realization Corporation, the guarantor's successor, alleged with respect to said repurchase as follows:

> "It was the intention in each instance upon the acquisition of the aforementioned certificates by Prudence to hold such certificates as investments, and the acquisition by Prudence was not intended at any time to constitute a cancellation or payment under its guaranty." (Record on appeal in *Prudence Realization Corporation* v. *Geist*, p. 24, fols. 71-72.)

This was specifically admitted by Geist, the Trustee, who was therein seeking subordination, as follows:

> "William T. Cowin, president of Prudence Realization Corporation, the respondent herein, formerly a trustee of the debtor, states in his affidavit that in many instances The Prudence Company, Inc. reacquired certificates theretofore sold to and held by the public, and that it was the intention of The Prudence Company, Inc., to hold such certificates in its own investment porfolio as an investment.
>
> "This deponent does not take any exception to such statement but respectfully submits that this presents an incomplete picture." (Record on appeal, *supra*, fols. 118-120.)

With respect to the Burnside Issue, the facts are entirely different. There was no "unissued" or "uncertificated" part of the mortgage. All the certificates were acquired by the guarantor as an incident to its guaranty, and in an obvious attempt to reduce or postpone its guaranty liabilities not, as claimed by petitioner, in the ordinary course of its business. The rights which petitioner is now asserting, are those of a subrogee, and hence there is a clear equitable basis for requiring the postponement of its rights under the rules laid down by the Court in *Prudence Realization Corporation* v. *Geist*.

The precarious financial condition of the guarantor immediately preceding and during the time when it was reacquiring its own defaulted securities has been described. It may be briefly recapitulated, as follows:

1. November, 1931, the guarantor seeks a $25,000,000 loan from Reconstruction Finance Corporation, admitting in its application therefor that the mortgages, if foreclosed, would not bring enough to cover its guaranty liabilities—and, by necessary implication, that the guarantor without the loan would be unable to meet them.

2. December, 1931, the guarantor's balance sheets show it to be unable to meet its maturing guaranty liabilities for the year 1932.

3. Its guaranty liabilities for 1932 are over twenty-five times as great as for 1931, and for 1933, are about $10,000,000 more again.

4. January, 1932, the Burnside mortgage is in default in the payment of an instalment of principal.

5. January, 1932, the guarantor suspends principal payments on its certificates and invokes its eighteen months' grace clause.

6. February, 1932, the Reconstruction Finance Corporation loan is granted for $20,000,000, but the guarantor does not revoke its suspension of principal payments.

7. March 3, 1932, the guarantor acquires its first Burnside certificate.

8. June, 1932, the guarantor commences heavy acquisitions of Burnside certificates.

9. July 1, 1932, the Burnside mortgage and certificates mature and are not paid.

10. January 23, 1933, the last Burnside certificate is acquired.

The guarantor acquired its first Burnside certificate on March 3, 1932, in the face amount of $1,500 (Ex. D, R. 40). Prior to this it had not owned any Burnside certificates (Stipulation, par. 6, R. 220). As maturity approached, the purchases grew heavier and in the month of June, 1932, immediately preceding maturity on July 1, 1932, the guarantor acquired certificates aggregating $23,852.75 in principal amount. The balance of the certificates aggregating $405,860.11 in principal amount were acquired after maturity, and likewise after default (R. 40-44).

The certificates were not cancelled at the time because, as the guarantor's assistant treasurer testified, they had matured, the mortgage had not been paid off, and cancellation was unnecessary (R. 149). It is not claimed that the certificates remained uncancelled because they were being retained in the portfolio as an investment. Nevertheless, on March 1, 1933, certificates aggregating $425,212.86 were cancelled and one certificate in that amount was issued to Reconstruction Finance Corporation. On April 4, 1933, this certificate was cancelled and another in the same amount was issued to The Prudence Company, Inc. (R. 44). The cancellations and reissues of the remaining certificates are shown at R. 44.

Three methods were used to acquire the certificates. The

first was the use of a secret and concealed brokerage account called the "Pender-Buckbee-Merriam" account (R. 44), which was known only by a number (R. 155). This account was used to acquire certificates at prices described as "substantially less than the par value thereof" (R. 16) and "rather substantial discounts" (R. 149). In the Burnside issue the discounts ranged from 15% to 34% (R. 44), although the guarantor advertised to its security holders that it would attempt to repurchase directly from them at discounts of only one per cent (R. 145). The "Pender-Buckbee-Merriam" account was created "within the first three months of 1932" (R. 149), or at about the same time that the guarantor invoked the eighteen months' grace clause, and shortly before the Burnside mortgages and certificates matured.

To the extent that the guarantor purchased its matured and defaulted securities at a discount, it was reducing *pro tanto* its guaranty liabilities, as distinguished from the purpose and method of acquisition of Zo Gale certificates. Hence, when it later asserts a claim based upon the certificates so acquired, it is, within this Court's language in the *Geist* case, in the position of a surety which has only partially fulfilled its obligations. Payment to it before the creditors are paid, will therefore not be permitted.

The second method of acquisition was to have the holders of matured or maturing Burnside certificates exchange them for certificates in other issues of later maturities (R. 146; Ex. D, R. 40-42). Sometimes the certificate-holder would be given part cash and a new investment for the balance. All new investments so issued were concededly of later maturities than the certificates in the Burnside issue and were not yet in default (Stipulation, par. 2, R. 220).

The purpose and effect of this practice was obviously to extend the time for the payment of the guaranty liabilities of The Prudence Company, Inc., and, therefore, any claim based on the Burnside certificates so acquired is, within this Court's language in the *Geist* case (p. 96), a claim derived from, or incident to, the guaranty, and was not acquired

independently of it. Here again the time, purpose and method of acquisition are different from those of the Zo-Gale certificates.

The third method of acquisition was the purchase of certificates directly from the holder for the minimum amount of cash which such holder could be persuaded to take (R. 146, 157-158). When the certificate-holder pressed for cash payment, his certificate "would be repurchased at five or six or seven, or sometimes even ten per cent. discount" (R. 157). Many of the certificates were purchased at "par flat" (R. 42-43), i.e. at a discount amounting to the accrued interest thereon (R. 158).

These acquisitions at a discount were for the purpose of reducing the guaranty liabilities and petitioner, as successor to the defaulting guarantor, is now improperly attempting to assert rights which are derived from partial performance of the suretyship obligation, again within the Court's language in the *Geist* case and again different from the acquisitions in that case.

It is thus precisely with respect to the existence of an equitable basis for subordination that the *Geist* case differs factually from this case. There is here a clear equitable basis for subordination in the undisputed circumstances surrounding the acquisition of the certificates by the guarantor. They show the acquisition by the guarantor of defaulted securities at substantial discounts just prior to, and after, maturity at a time when the guarantor, if not actually insolvent, had at the least, a seriously impaired capital, and was forced to borrow from the government to keep in business at all. To say that such acquisitions were "independent of the guaranty" is to fly in the face of the facts. At that time, and under those circumstances, the guarantor could have had no thought but to reduce or postpone its pyramiding guaranty liabilities. It was struggling desperately with every means at its command to prevent or delay the debâcle which finally occurred. It could not have purchased these certificates in the ordinary course of its business, as petitioner claims, or for investment purposes, because at that time its business was not running any "ordinary course", and it had no funds

available for investment in defaulted securities. It was simply engaging in salvage operations.

We submit that on the present record, every equitable consideration requires here the postponement of the rights of the defaulting guarantor. *American United Mutual Life Insurance Co. v. City of Avon Park*, 311 U. S. 138; 145-146.

Petitioner has urged, however, that the *Geist* case goes further than has been stated in this brief. Its claim is that the *Geist* case has decided once for all that there may be no subordination of certificates, and that neither this nor any other court is now free to determine whether or not there should be subordination simply because the guarantor is bankrupt. This claim amounts to saying that something mysterious has happened during the bankruptcy which forever prevents the question of subordination from being raised in this or any other case. An analysis of the *Geist* case, however, will reveal that this is not the fact.

It held that to the extent that the New York cases lay down a rule of state law governing the rights of claimants in state liquidations, they do not control in making distributions in bankruptcy (316 U. S., at p. 95). However, since the bankruptcy court is a court of equity, it must determine, with "appropriate regard for rights acquired under rules of state law", whether the conduct of a claimant in acquiring its claim is inequitable so as to require subordination to other claims which would otherwise be of the same class. Hence, the question remains whether there is, in fact, any equity which requires a defaulting guarantor to subordinate its claims (316 U. S., bottom p. 95, and top p. 96). That question must always be faced because of the basic principle that a surety may not "compete with other creditors payment of whose claims he has undertaken to assure, until they are paid in full" (316 U. S., at p. 96), and because the bankruptcy court admittedly has power to "subordinate the claims of one claimant to those of others of the same class where his conduct in acquiring or asserting his claim is contrary to established equitable principles. *See Taylor* v. *Standard Gas Co.*, 306 U. S. 307; *Pepper* v. *Litton*, 308 U. S. 295; and *In re Bowman Hardware & Electric Co.*, 67 F. [2d] 792". (316 U. S., at p. 93.)

But this Court found on the facts of record before it, that the equitable basis for subordination was wanting because the rights acquired by the guarantor in that case were acquired independently of the guaranty and were not those of a subrogee acquired as an incident of the suretyship (316 U. S., *supra*, at p. 96).

Then the Court inquired whether a basis for subordination could be justified on the theory of avoiding circuity of action, despite the lack of such equities, and pointed out (p. 97 of the opinion) that this basis is available only in the case of a solvent guarantor and is not *alone* a valid reason if the guarantor is insolvent. Despite assertions to the contrary by petitioner, the insolvency of the guarantor has no other significance. This was clearly recognized by the United States Circuit Court of Appeals for the Second Circuit in a case involving a similar guaranty by this very same bankrupt guarantor.

> *In re Prudence-Bonds Corporation* (*supra*), 102 F. (2d) 531, 534 (C. C. A., 2nd, 1939).

Thus, this Court, in complete harmony with the *Geist* case, may here subordinate the reacquired certificates, as every consideration of justice and equity requires.

POINT VII.

THE STATE COURT PROPERLY DECIDED A QUESTION OF LOCAL LAW AND ITS JUDGMENT SHOULD BE AFFIRMED.

Respectfully submitted,

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Trust Company and Martin S. Lindgrove,
as Trustees, etc., Respondents.

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No. 137

In the Supreme Court of the United States

OCTOBER TERM, 1944

PRUDENCE REALIZATION CORP., PETITIONER

v.

FERRIS ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION, AMICUS CURIAE

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This controversy, which comes here from the Court of Appeals of the State of New York, arose in connection with the distribution of the proceeds of a mortgage under a plan for the reorganization of guaranteed mortgage participation certificates under Section 77B of the Bankruptcy Act. This plan was confirmed by the United States District Court for the Eastern District of New York in proceedings for the reorganization in bankruptcy of Amalgamated Properties, Inc., without determining the relative rights in the mortgage of certain certificates held

by the guarantor. Instead it reserved adjudication of these rights to a "court of competent jurisdiction." A proceeding was instituted in a New York state court to obtain an adjudication of this question. The Securities and Exchange Commission did not participate in the proceeding in the New York courts but believes that a statement of its views is appropriate in this Court because the implications of the decision below have an important bearing on creditors' rights in federal reorganization proceedings. This brief is accordingly submitted as *amicus curiae*.

OPINIONS BELOW

The opinion of the Special Term of the New York Supreme Court (R. 221–222) has not been officially reported. The opinion of the Appellate Division, First Department (R. 232–233), reversing the Special Term, is reported in 266 App. Div. 543. The opinion of the New York Court of Appeals (R. 241–251), reversing the Appellate Division, is reported in 292 N. Y. 210.

JURISDICTION

The judgment of the Supreme Court of New York pursuant to the mandate of the New York Court of Appeals was entered April 24, 1944 (R. 238–240). A petition for writ of certiorari was filed June 7, 1944, and granted October 9, 1944 (R. 252). Jurisdiction of this Court is invoked

under Section 237 (b) of the Judicial Code (28 U. S. C. 344 (b)).

QUESTIONS PRESENTED

1. Whether federal or state law should govern the status under a Section 77B plan of reorganization of a guarantor's holding of its own guaranteed certificates relative to the rights of public holders of such certificates, where the plan has reserved that question for subsequent determination in any court of competent jurisdiction and the question has in fact been raised in a state court.

2. Whether, as a matter of federal equity as administered in bankruptcy, holdings by an insolvent guarantor of securities guaranteed by it should be subordinated to holdings of public security holders where the guarantor's holdings were acquired after default and in an effort to reduce or defer its obligations as guarantor.

STATEMENT

In view of the full statement of facts to be expected in the briefs of petitioner and respondents, we refer only to the following facts as of particular importance to an understanding of the Commission's views:

The Prudence Company, Inc. ("Prudence"), which was engaged in the mortgage-guaranty business, sold to the public certificates of participation in a bond and mortgage made by Burnside

Improvement Company, Inc., and guaranteed to certificate holders the payment of interest thereon when due and of the principal thereof when due or within 18 months thereafter[1] (R. 12–13, 36–39). Burnside defaulted in the payment of an installment of principal due January 1932[2] (R. 90). After this default and within the 18 months' period of grace provided in the guarantee, Prudence purchased certificates aggregating $431,212.86, or approximately 42% of the $1,016,000 face amount of certificates outstanding (R. 13–14, 40–44, 220). These certificates were acquired by Prudence, the guarantor, by purchase, usually at a discount, either directly from the holder or through a concealed brokerage account, and by exchange for certificates in other issues of later maturities.[3] (R. 15–16, 40–44, 146, 149, 157–158, 220).

In 1935 Prudence went into section 77B reorganization (R. 14), and in 1938 was adjudicated insolvent (R. 16). Thereafter a plan for its reorganization was confirmed by the district court (R. 16, 49–71). The plan transferred to peti-

[1] Prudence, which had made the mortgage loan to Burnside and assigned the bond and mortgage without consideration to an affiliate (Prudence-Bonds Corporation), sold to investors certificates of participation which the affiliate had issued and, without payment of any consideration, delivered to Prudence (R. 12, 13).

[2] The entire principal matured July 1932 (R. 147).

[3] In many cases the certificate holder was given part cash and a new investment for the balance (R. 40–44).

tioner, Prudence Realization Corporation, all the assets of the defaulting guarantor (R. 16) including the reacquired Burnside certificates.

Prudence Realization Corporation is engaged in conserving and liquidating the assets it has received for the benefit of the creditors of Prudence including those holding claims on the guarantees of Prudence amounting to $122,214,000 (R. 16, 46).[4] The principal other creditor of Prudence was the R .F. C. with an unsecured claim of $11,347,775.50 (R. 66), representing the balance of a $20,000,000 loan after application of the security for the loan. Under the plan the extent of the claim of the holder of a guaranteed obligation is determined by an appraisal of the value of the property securing his claim and the deduction of that value from the face amount of the guaranteed obligation (R. 58—60, 66–69, Plan Art. IV, 2 (ii), Art. V).

Amalgamated Properties, Inc., a wholly owned subsidiary of Prudence, was caused by Prudence to take title in 1932 to the property subject to the Burnside mortgage (R. 14, 125). In March 1936 Amalgamated filed a voluntary petition for reorganization under section 77B as part of the reorganization of its parent (R. 14, 220). The two proceedings were later severed (R. 220).

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[4] Of this amount the claims arising out of guarantees by Prudence of secured bonds were $58,833,000, of mortgage participation certificates, $50,858,000, and of whole mortgages, $12,523,000 (R. 46).

Prudence filed a claim in the Amalgamated proceeding based on its holding of the Burnside certificates. Objection was made that Prudence, having defaulted on its guaranty, could not participate in the mortgage on a parity with other holders of certificates (R. 16). The Burnside plan, as ultimately confirmed (R. 96-122), did not decide the question of the participation to be granted Prudence on its interest in the bond and mortgage, but reserved this question for adjudication by a "Court of competent jurisdiction" (R. 121). Pursuant to the plan, the Burnside bond and mortgage and title to the property were assigned to Ferris, Long and Leifert, trustees appointed for the certificate holders, without merger of the mortgage and fee (R. 96, 97, 100, 101, 244).

The Amalgamated proceeding was terminated (R. 130, 245) with the question of parity not determined or reserved for determination by the bankruptcy court. Thereafter, an action was instituted in the New York Supreme Court, Special Term, by the trustees and various certificate holders against Prudence Realization Corporation to determine the rights of participation to which the certificates acquired by the insolvent guarantor were entitled (R. 171, 211). None of the parties questioned that the state court was a court of "competent jurisdiction" within the meaning of the plan. Petitioner asked summary judgment decreeing that it was entitled to parity (R. 215-

219). Summary judgment was denied (R. 221–222), petitioner appealed, and the Appellate Division reversed the order denying summary judgment and granted such judgment (R. 232–237). On appeal, the Court of Appeals of New York reversed the Appellate Division, holding that in the proceeding before it the question of parity is one of state law and that under local law the guarantor's holdings will be subordinated to the other certificates. Pursuant to the mandate of the court, judgment was entered by the Supreme Court of New York. It is this judgment which is before this Court for review.

I

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or subordination turned upon equitable principles governing the administration of insolvent estates, and that it is for the bankruptcy court "to define and apply federal law in determining the extent to which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy requires its subordination to other claims which, in other respects, are of the same class. . . . Hence the New York rule, in the absence of an actual agreement to subordinate the guarantee, is merely a general rule of law governing ordinary proceedings, it is not controlling in bankruptcy."

It would seem that the Second Court is determining that the issue involved here presents a question of federal law unless (1) the decision of the court below has not applied "merely a general rule of law governing ordinary proceedings," but is based upon an actual agreement to subordinate the guarantee under the circumstances of the case, or (2) the circumstances that the issues arise in a state court prevents the bankruptcy court in adjudicating rights of participation under a Section 77B plan to apply the same rule of equity in bankruptcy proceedings. It is our position that neither of these possible bases of distinction is in fact applicable.

1. *The basis for the decision by the court below that the guarantor's holdings of the bond issue should be subordinated.* The decision of

the court below does not turn upon a finding of an actual agreement to subordinate. We invite the Court's attention particularly to that portion of the opinion of the Court of Appeals which, after reviewing the New York decisions and considering separate clauses in the certificate granting both forward an intention to subordinate and forward an intention to permit parity of treatment, concludes "when there is ambiguity in the agreement relied upon by the guarantee in support of a claim of parity, the rule drops away in the guarantee is subordinated" (italics supplied). * * * Under the settled course of decisions in this state the Trustees holdings are not entitled to parity. (R. 211)

The above quoted language indicates that the decision of the court below stands upon a principle of law so different from that which formed the basis of the earlier decisions of the Court of Appeals considered by this Court in the former cases. Those decisions were held to have established merely a general rule of law governing distribution in insolvency proceedings. We find no indication in the opinion of the court below that it disagrees with this Court's interpretation of the earlier New York cases or it interpreted that the state law as giving the public holders of the certificates any vested equitable right accruing to the insolvency proceedings which would have entitled them to insist upon subordination of the Trustees

holdings even had the issue been determined in the bankruptcy court.[5]

2. *The nature of the jurisdiction exercised by the state court under the plan.* The plan in pro-

[5] We have considered the possibility that the state law as revealed in this most recent decision of the Court of Appeals presents a different problem from the state law which was before the court in the *Geist* case in that there is now held to be as a matter of substatnive state law an equity in favor of subordination of the holdings of an insolvent guarantor which even a bankruptcy court would be bound to respect. Some basis for such a construction of the opinion below may be derived from the following language:

"The suits in the State court which are now before us are not proceedings in bankruptcy nor are they state liquidation proceedings. Each is brought to determine relative rights in property held for the satisfaction of a mortgage. Such rights, if not determined or defined by provisions of a plan of reorganization predicated upon the consents required by the Bankruptcy Act and approved by the bankruptcy judge as 'fair and equitable,' must be determined by the law of New York where the land is situated and where the bond and mortgage, the participation certificates and the agreement of guaranty were made and delivered. Accordingly, it becomes necessary for us to consider whether any provision of an approved plan of reorganization or any order of the bankruptcy court has determined or defined the relative rights of Prudence and other certificate holders to share in the security of the mortgage or in sums received on account of the mortgage debt. We find none in this record * * *." (R. 242-243).

Assuming that this language does place the New York law upon a different basis from that relied upon by this Court in the *Geist* case, there remains the question whether the issue is not inherently one as to relative rights of distribution in an insolvent estate and therefore subject to exclusive determination under the federal bankruptcy power. See the opinion of Frank, J., dissenting, in the *Geist* case in the Circuit Court of Appeals, 122 F. (2d) 503, 510.

viding for the determination of the issue of parity or subordination in a court of "competent jurisdiction" left open the question of whether the court of competent jurisdiction should be the bankruptcy court itself or some other court, state or federal. However, the fact that the reorganization proceeding was closed without any reservation of jurisdiction in the bankruptcy court, indicates a practical construction of the plan as intended to permit adjudication of the issue in some other court. In addition all parties to the action in the court below appear to have been in agreement that the New York Supreme Court is a court of "competent jurisdiction" within the meaning of the plan.

As an original question we would regard as erroneous the action of the reorganization court in failing to retain exclusive jurisdiction to determine an issue so close to the heart of what was "fair and equitable" in the circumstances. Nevertheless, since the plan did contain such a provision and the actions of the reorganization court in confirming such a plan and of terminating the proceeding without reserving exclusive jurisdiction to determine the issues are no longer subject to review, we do not think that any error on the part of the reorganization court would prevent the court below from exercising the jurisdiction which the parties acknowledged.

There remains the question of the nature of that jurisdiction. The plan clearly did not contemplate transferring the administration of the estate to any other forum, but purported merely to accelerate the termination of the bankruptcy administration by reserving for future determination as a legal, not an administrative, question the one substantial issue in dispute. Accordingly, both by the terms of the plan and by the pleadings, the action in the state court is an action for declaration of rights and not a proceeding for administration of the insolvent estate in the state court. As an action for declaration of rights arising under a plan of reorganization confirmed by the Section 77B court, it would seem to follow that the state court is bound by federal decisions defining and interpreting the rights to participate in the bankruptcy proceeding.

The opinion of the court below is in accordance with this analysis insofar as the Court of Appeals concluded that "the suits in the State court which are now before us are not proceedings in bankruptcy nor are they state liquidation proceedings" (R. 242). However, the court went on to decide that the failure of the bankruptcy court to take any action which might modify the relative rights in the property held for the satisfaction of the mortgage left the state court free to determine the question by the law of New York (R. 243). The Court of Appeals thereby construed the plan as involving not only a failure of the bankruptcy

court itself to determine whether subordination or parity might be found to be "fair and equitable", but as involving a far more questionable abdication by that court which would permit the issue to be decided in accordance with substantive standards which might be different from those which would be applicable in the bankruptcy proceeding itself. It is submitted that no such result could have been contemplated by the parties to reorganization or by the reorganization Judge in approving such a plan.[6] Under our construction of the plan, the state court in accepting jurisdiction to define the rights of the parties as created under the plan was accepting jurisdiction to determine an issue which the *Geist* case had held to be one of federal bankruptcy law, and therefore the correctness of its decision must be considered in the light of the applicable principles of federal law.

Despite what we conceive to be an error on the part of the court below in not treating the issue

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[6] Since the plan was adopted prior to the *Geist* case, it may be that there was then a difference of opinion as to whether the issue of parity or subordination should be regarded as an issue of state law or one of federal equity as administered in bankruptcy, but this question like the ultimate question must have been intended to be decided on a uniform basis regardless of the forum selected. It may be noted that if the Court of Appeals was correct in its holding, a federal court other than the bankruptcy court might likewise have been required under the doctrine of *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64, to decide the question in accordance with state law.

before it as one of federal law, we do not urge that the decision be set aside. For reasons set forth in the next section of the brief, we believe that the decision below should be affirmed because the facts were such as to require subordination of the guarantor's holdings under principles of equity which the *Geist* case recognized to be applicable in bankruptcy proceedings.

II.

THE DECISION OF THE COURT BELOW IS IN ACCORDANCE WITH THE PRINCIPLES OF EQUITY PROPERLY APPLICABLE, AS A MATTER OF FEDERAL LAW, TO THE STATUS OF CLAIMS PRESENTED BY A GUARANTOR IN A BANKRUPTCY REORGANIZATION PROCEEDING

While the Court of Appeals did not regard the *Geist* case as controlling, its decision is nevertheless in accordance with the principles of federal law expressed in that case. The *Geist* case in holding subordination improper on its own facts, nevertheless recognized that principles of suretyship law enunciated in cases involving solvent guarantors do as a general rule preclude the guarantor from participating on a parity with the holder of his guarantee. The facts presented in the *Geist* case were found to constitute an exception to that general rule on two grounds: First, it was held that no substantive considerations of equity warranted the subordination of the holdings of Prudence in the particular mortgage, since those interests had been acquired not as a subrogee or as an incident to its guarantee, but independently

of the guarantee. Second, the court held inapplicable the procedural consideration of avoiding circuity of action which might nonetheless have warranted subordination in the case of a solvent guarantor. In view of the guarantor's insolvency and the pending judicial reorganization proceedings, it was observed that subordination would have a substantive consequence upon the relative rights of the general creditors of Prudence and the holders of the guaranteed certificates. It is our position (1) that the facts of the present case warrant subordination upon substantive equitable grounds which the *Geist* case recognized to exist in the case of holdings acquired in connection with the guarantee, and (2) that this equity has a substantial practical basis both from the point of view of safeguarding the integrity of the guarantor's conduct in relation to the guarantee and from the standpoint of minimizing difficulties in the reorganization of guaranteed obligations.

1. With respect to the circumstances of acquisition, it may be noted that the *Geist* case dealt with guarantor's holdings constituting a relatively small percentage of the aggregate amount of the Zo-Gale issue involved in that case, consisting in large part of a residue of unsold participations in the mortgage, and, in part, of a small amount acquired as a bona fide investment when default was not anticipated. In the present case, however, the entire amount of the guarantor's holdings, constituting in the aggregate 42% of the

outstanding issue, was acquired after default on the Burnside issue and after Prudence had invoked the 18 months' grace period allowed for the payment of its guarantee. They were acquired as an incident to and in connection with the guarantee—in fact as a means of dealing with the more insistent holders of the guaranteed obligations, and in an effort to reduce its obligations as guarantor.

It had been the long established practice of Prudence to anticipate maturities of particular guaranteed issues by approaching certificate holders and attempting to sell them a new certificate of later maturity (R. 167–168, 169). As between Prudence and its customer, Prudence would thereby discharge its obligation as guarantor through the sale of a new guaranteed obligation. Under conditions prior to 1932 the customers understood, of course, that they might receive as an alternative the face amount of the old security. But with the advent of financial difficulties for the various real estate companies whose issues had been guaranteed, and for Prudence, a new element entered into the picture. Prudence had invoked the 18 months' grace period and was no longer prepared to discharge its guaranty at the maturity of the issue. At the same time Prudence undertook to effect settlements with its certificate holders on an individual basis by payments in cash where the certificate holder was clamoring

for cash, but usually at a discount; and by sale of a new certificate of later maturity when the customer could be induced to accept one; and by combination of cash payment and exchange for new certificates (R. 146, 157). There is testimony that a committee was set up to determine on the basis of individual need whether a particular customer would receive all or part of his claim in cash. However, the record of individual purchases shows gross discrimination in the basis for cash settlements at approximately the same time[7] and warrants the inference that examination into the needs of the customer served primarily as an index of the amount of the discount he might be willing to take for cash—or as to whether there might be other reasons for settling with the customer.

As in the pre-depression practice with respect to handling maturities, these transactions amounted in practical effect to a settlement and

[7] Examination of the details of acquisitions (R. 42–44) shows examples on the same day or within a few days where securities were repurchased in full at par, or repurchased in part at par or par plus interest, and in part exchanged for other certificates, while some securities were repurchased for cash at substantially below par. Cf. R. 43, Cert. 617, bought on July 7, 1932 at 52 flat with Certs. 385 and 482 bought on the same day for par flat and Certs. 433 and 796 bought for par flat on July 5 and 6. See also R. 42, Cert. 246, 184, and 123, on July 5 and 6, involving partial repurchases at par flat and partial reinvestments. Cf. Cert. 63 and 106 on July 8.

discharge of the guarantor's obligation rather than an investment in the outstanding certificates. The fact that the guarantor had invoked the grace period and that there was uncertainty as to whether it would ever meet the obligations in full made it possible for the guarantor to settle its obligations at a discount but did not change the character of the transaction as amounting in practical effect to the settlement of claims against it. Nor are the equities in favor of the guarantor's holdings enhanced by the fact that many of the purchases at a discount were made through a concealed brokerage account. With respect to all those transactions it could not be said, as this Court said in the *Geist* case, "they were acquired independently of its guaranty. They are not derived from or an incident to it."[8]

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[8] Prudence's activities in acquiring the certificates must be considered in the light of the provisions of the depositary and guaranty agreement under which the guarantor and its affiliate, Prudence-Bonds Corporation, virtually assumed the function of an indenture trustee for the certificate holders under an instrument carefully designed to give them the maximum of control over the mortgage although accompanied by sweeping exculpatory language purporting to minimize the responsibility of both the Depositary and the Prudence companies. Under the terms of the guaranty (R. 36) the guarantor corporation "is made irrevocably the agent" of the certificate holder "to collect the principal and interest as it falls due on said bond and mortgage aforesaid." The issuer of the certificates, Prudence-Bonds Corporation, stipulates in the certificate for similar collection rights on

2. Under the circumstances here present, the *Geist* case assumed that there would be an affirmative equity of subordination affecting the guarantor's holdings. Neither the *Geist* case nor the cases cited in the opinion articulate the basis for this assumption beyond intimating that it is in-

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behalf of itself or the guarantor, including the right "to take any action it may deem necessary or proper to protect the mortgage security and in its own name to enforce" the bond, mortgage, etc., and to "waive or modify" conditions in the bond or mortgage, including extending or waiving the payment of any installment of principal, provided only that the guarantor be not released (R. 33). Incorporated by reference in the certificate and made binding on the certificate holders is the depositary agreement between Prudence-Bonds Corporation and the Bank of America. That agreement is carefully defined to avoid assumption of any express trust by the bank, and while the depositary is given the sole right to protect the mortgage security and to enforce the bond and mortgage in the name of itself or of the certificate holders (Art. XVII, R. 27), it is not required to do so except upon written request of Prudence-Bonds Corporation or, if the certificates are in default, upon the written request of the holders of not less than 50% of the aggregate principal amount of the certificates then outstanding, and then only upon receiving satisfactory indemnity (Art. XIII, R. 24–25; Art. XIX, R. 28). Prudence-Bonds Corporation is made agent of the depositary to collect principal and interest on the mortgage and to disburse the same whether before or after default (Art. XXIII, R. 29–30).

Prudence's fiduciary position in this connection emphasizes the inequity of permitting it to prove on a parity those securities which it had purchased from its beneficiaries at substantial discounts in an effort to reduce and defer its own liabilities.

herent in the contractual obligations assumed by the guarantor.

Petitioner argues that any vice in these activities by which the guarantor's holdings were acquired was either in paying too much, in which case it is claimed that the general creditors of the guarantor and the remaining holders of the guaranteed creditors were equally prejudiced, or in paying too little, in which case any prejudice to those who sold out would only have redounded to the benefit of the remaining security holders by swelling the amount available in the guarantor's estate. If, however, the guarantor had shown greater respect for the integrity of its obligation and had undertaken to make payments pro rata on account of its guarantee to the extent of available funds, no question could have arisen as to the guarantor—or his estate—asserting any rights of subrogation against the individual real estate properties until after its guarantee had been discharged in full. Thus, unless subordination is enforced the remaining holders of the guaranteed obligations will have been prejudiced by the failure to make a pro rata payment in the attempt of the guarantor to escape full responsibility on its obligations.

Furthermore, to permit a guarantor, after default has occurred or is imminent, to acquire participations in the guaranteed issue with a view to proving them in competition with the public

security holders is to enable the guarantor to obtain a strategic position in any reorganization of the debtor, which may be used to harass and impede the realization of the claims of the public security holders against the debtor. Such acquisitions are thus in derogation of the guarantor's obligation.[9]

The dangers of permitting the guarantor to obtain such power over the reorganization of the debtor's estate flows from the inherent conflict between the interest of the guarantor to minimize its liability on its guarantee and the interest of those public security holders [redacted] the guaranteed issues. This conflict is the more insidious because it is not apparent to the average security holders, who may be misled into regarding any suggestions made by the guarantor in its capacity as a holder of the guaranteed issue as made solely with a view to obtaining the best possible treatment for the guaranteed issue. Such conflicts of interests may lead to action tending to delay the reorganization of the guaranteed issue where the guarantor happens to favor delay in the hope that time may lead

[9] Acquisition of strategic blocks of the guaranteed issue may even result in delaying efforts of the public security holders to compel action for the enforcement of their claims against the debtor. Thus Prudence's acquisition of 42% of the Burnside issue made virtually impossible the formation of any combination of public security holders sufficient to constitute the 50% of the outstanding issue which was necessary before the depositary could be required to take any action in connection with the enforcement of the mortgage.

to higher valuations than present circumstances would warrant. Such conflicts may also result in pressure for unrealistic reorganizations of the individual issuers involving extensive accounts of debt and other face value securities which may lend themselves more readily than would a more conservative security structure to arguments that the public security holders have received adequate satisfaction of their guaranteed claims. The courts in the reorganization proceedings might, of course, have power to mitigate or even frustrate the evils which flow from such a situation by their powers of classification and their powers to disqualify votes (see Section 216 of the Bankruptcy Act). But such powers are rarely successfully exercised and in practice the acquisition of a large block would give the guarantor a position which would frequently be effective in the settlement of those conflicts between claims mentioned in the preceding.

Another aspect of acquisition of guaranteed issues by the guarantor of a class of issuers is that the guarantor is likely to acquire the securities of the more aggressive of the junior holders of the guaranteed securities. Such persons, just because they are more aggressive and perhaps better informed than their fellow security holders, would be the potential leaders in any reorganization designed to obtain maximum recognition upon the guaranteed claims. To ignore the natural role of controlling which subordinates the

holdings of the guarantor will prevent such conflicts of interest from arising and tend to compensate the holders of the guaranteed claims for their failure to participate in the payments received by more alert guarantors.

Petitioner argues, however, that all such equities should be brushed aside in favor of parity of treatment for the sole reason that the guarantor is insolvent. Accepting this argument would not be following the terms now but going far beyond the holdings. In that connection it should be noted that creditors of the guarantor have outstanding the conflict of interest inherent in the structure holdings in the guaranteed bonds which are now held by the guarantor's estate. The estate is therefore interested in reducing the total amount of claims which might be asserted against it on behalf of holders of the guaranteed bonds and thus advised and confident with action which it might otherwise be prompted to take in furtherance of the reorganization of the guaranteed issue. We do not, of course, urge that such conflicts have in fact been operative in the Prudence reorganization. It is sufficient that the potentialities of any such conflicts of interest

Petitioner's arguments based on the fact that subordination may make for some fragmentation of [illegible] in the separate treatment of holders of the Riverside issue and other creditors of the guarantor, involving consideration of [illegible]

their influence upon the New York state courts where many guaranteed real estate issues have been reorganized. Considering the impact upon such creditors of the guarantor as are also holders of the various guaranteed issues, of a rule requiring subordination rather than parity of treatment, it may well make for more expeditious and practical reorganization to apply the rule of subordination. The consequence is that each class of certificate holders looks primarily to the separate estate of the mortgagor and is to that extent the less interested in realizing upon its claim against the guarantor's estate. The guarantor's estate in turn is less involved in the multitude of reorganizations of individual mortgage issues. In our judgment whatever element of fortuity there may be in applying the rule of subordination is outweighed by the prospects for more speedy realization which result from permitting each issue to be dealt with so far as possible as a separate reorganization.

There remains the problem as to whether the existence of general creditors' claims, such as that of the R. F. C. here, presents a special consideration in favor of parity of treatment with a view to swelling the participation of such general creditors in the guarantor's estate. In that connection it should be noted that we are here dealing with the unpaid balance of what was formerly a secured claim, which must therefore rest only on the general credit of the guarantor.

It is our view that persons extending general credit to a company engaged in such a type of business, involving as it does complex fiduciary relationships to the many holders of its guaranteed issues, should be held to have made their loans subject to the risk of any equities of subordination which should apply as between Prudence and the holders of the guarantees. Their situation in that respect is not unlike that of creditors of a holding company who necessarily take the risk of equities of subordination in the holding company's dealings with its subsidiaries. See *Taylor* v. *Standard Gas & Electric Co.*, 306 U. S. 307.

CONCLUSION

It is submitted that the decision of the court below should be affirmed as in accordance with the principles of equity properly applicable as a matter of federal law to rights of participation in a bankruptcy reorganization.

Respectfully submitted.

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I have authorized the filing of this brief.

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SUPREME COURT OF THE UNITED STATES.

No. 137.—October Term, 1944.

Prudence Realization Corporation, Petitioner, *vs.* Joseph W. Ferris, et al., Respondents.	On Writ of Certiorari to the Supreme Court of the State of New York.

[January 29, 1945.]

Mr. Justice Frankfurter delivered the opinion of the Court.

This action was brought in one of the courts of the State of New York to adjudicate conflicting claims against property held to satisfy a mortgage debt. The immediate controversy arises out of the reorganization in a United States district court of a large New York guaranty company, another phase of which was before us in *Prudence Corp.* v. *Geist*, 316 U. S. 89.

Petitioner's predecessor, The Prudence Company, Inc., loaned money on real estate and issued guaranteed mortgage participation certificates. (For an exposition of the business details see *In re The Westover Inc.*, 82 F. 2d 177.) The enterprise was on a vast scale, running into the hundreds of millions. Our immediate concern is with certificates of participation issued by Prudence in a bond and mortgage made by Burnside Improvement Company. Prudence guaranteed the certificate holders the payment of interest and principal when due or within eighteen months thereafter. Burnside, the mortgagor, defaulted in the payment of an instalment of principal due January, 1932. After this default, Prudence itself purchased, either directly from the holders or through a concealed brokerage account and usually at a discount, certificates aggregating $431,212.86, approximately 42% of the amount of outstanding certificates. In June, 1932, the mortgaged premises securing the Burnside certificates were conveyed to Amalgamated Properties, Inc., a wholly-owned subsidiary of Prudence.

In 1935 Prudence went into reorganization under § 77 B of the Bankruptcy Act, and was adjudicated insolvent in 1938. As part of the Prudence proceedings, Amalgamated, in 1936, filed a

48 Stat. 912,

voluntary petition for reorganization, but the two were later severed. Thereafter, under a reorganization plan confirmed by the District Court, all the assets of Prudence, including the Burnside certificates reacquired by it, were transferred to petitioner, Prudence Realization Corporation.

In the Amalgamated proceeding Prudence claimed to participate in the mortgage on a parity with other Burnside certificate holders. The claim was opposed on the ground that Prudence, having defaulted on its guaranty, was not entitled to parity with other holders of certificates. The bankruptcy court neither decided this question of parity nor reserved it for decision. It "terminated and finally closed" the Amalgamated proceeding by confirming a plan which left the claim of participation by Prudence in the Burnside bond and mortgage for adjudication by a "Court of competent jurisdiction". There were provisions, with which we are not here concerned, for holding in escrow, pending such an adjudication, the share claimed by petitioner.

Thereafter, respondents, the trustees under the Burnside plan, and various certificate holders brought this action in the New York Supreme Court to determine petitioner's right to participate as holder of certificates acquired by the insolvent guarantor. Petitioner's claim for parity of treatment was denied, but this denial was reversed by the Appellate Division, 266 App. Div. 543, which in turn was reversed by the Court of Appeals. It held that state law governed and that New York subordinated the guarantor's certificates. 292 N. Y. 210. We brought the case here, 323 U. S. —, because conflict with *Prudence Corp.* v. *Geist, supra,* was strongly pressed. Precise appreciation is therefore required of the record now before us compared with that on which the *Geist* decision was based.

In the *Geist* case, the claim of parity by the same petitioner arose in connection with different property and another certificate issue, the Zo-Gale issue. In that case also the question of parity was not settled in the order of confirmation. But, while it was reserved for a court of competent jurisdiction, the confirmation order clearly indicated that the bankruptcy court was reserving jurisdiction in itself. "The court retains jurisdiction to hear and determine all questions arising under paragraph 7 of this order" —so ran the terms of the reservation of the parity question in the *Geist* case—and the trustees "are hereby granted leave to apply at any time at the foot of this order for such adjudication." The

trustee, Geist, accordingly applied to the bankruptcy court for an order adjudicating the rights of the certificate holders and that court, "In the Matter of a Plan of Reorganization of Amalgamated Properties, Inc., Debtor, in Respect of the Zo-Gale First Mortgage Participation Certificates" issued an order to show cause. When the Amalgamated proceeding with respect to the Zo-Gale property was subsequently closed, the order provided that "these proceedings shall hereafter be treated as dismissed for all purposes, except the determination of the questions raised in the pending motion by A. Geist . . . for determination of the relative priorities . . ." The bankruptcy court had patently retained for decision the question affecting the distribution of the bankrupt's property, although in all other respects it had wound up the proceedings. "The bankruptcy act prescribes its own criteria for distribution to creditors . . . . The court of bankruptcy is a court of equity to which the judicial administration of the bankrupt's estate is committed. . . . and it is for that court—not without appropriate regard for rights acquired under rules of state law—to define and apply federal law in determining the extent to which the inequitable conduct of a claimant in acquiring or asserting his claim in bankruptcy requires its subordination to other claims which, in other respects, are of the same class." *Prudence Corp.* v. *Geist*, *supra* at 95. Accordingly we held that the district court, sitting as a bankruptcy court, was under duty to apply federal and not state law, and that, in the circumstances of the *Geist* case, there was "no agreement and no equitable basis for depriving the Prudence Company and its creditors of the benefits of the usual bankruptcy rule of equality". *Prudence Corp.* v. *Geist*, *supra* at 97.

This case is not the *Geist* case. Here the bankruptcy court neither considered the question of parity nor retained jurisdiction to consider it. The order of confirmation contained no provision for retention of jurisdiction to decide the parity question as did the *Geist* order. Nor did the closing of the reorganization reserve jurisdiction, as did the *Geist* closing order. The provisions for disposition of the impounded funds in case subordination be determined are much more elaborate than the *Geist* case discloses. In short, while the provisions for adjudication of the parity question in the *Geist* case clearly contemplated determination of it as part of the reorganization proceedings by the bankruptcy court itself, in

the present case the bankruptcy court washed its hands of the problem and left the parties to litigate the question in another forum. For it is not questioned that the state court was a "Court of competent jurisdiction" for adjudicating the claim of parity.

To be sure, the Securities and Exchange Commission, as *amicus curiae*, suggests that the bankruptcy court was in error in failing to retain jurisdiction for determining this aspect of distribution. But the different treatment of the same problem by the same court in the *Geist* case and in this, together with acquiescence by the petitioner in the closing order without seeking a review of the nonretention of jurisdiction, give ground for believing that the arrangement was the product of bargaining between the parties. In any event, since no appeal was taken, it is not now open to find error by the bankruptcy court in failing to retain jurisdiction. The order confirming the plan of reorganization is res judicata, *Chicot County Dist.* v. *Bank*, 308 U. S. 371, 378.

But it is urged that although the bankruptcy court specifically refused to consider the rights of the parties and remitted them, plainly enough, to the state courts for their determination, the rights were to be determined in the state courts by federal law because the parties had passed through federal reorganization proceedings. In spite of an order of final termination, the authority of the bankruptcy court somehow continues to be effective. Despite the fact that neither the bankruptcy court nor the reorganization statute professes to alter rights unless disclosed in the plan or in an order, we are asked to recognize some enveloping cloud of amenability to the law governing bankruptcy proceedings.

We find no warrant in the statute for so holding. Section 77 B, [redacted] under which this reorganization was accomplished, provides in subsection (g) that upon confirmation "the provisions of the plan and of the order of confirmation shall be binding". The rights are thus fixed as the plan and the order provide and are not otherwise affected. Subsection (h) provides that upon final confirmation the debtor or its successor corporation "shall put into effect and carry out the plan and the orders of the judge relative thereto . . . and the property dealt with by the plan . . . shall be free and clear of all claims of the debtor, its stockholders and creditors, except such as may consistently with the provisions of the plan be reserved in the order confirming the plan . . . ". The final decree, discharging the trustees and closing the case,

"shall discharge the debtor from its debts and liabilities, and shall terminate and end all rights and interests of its stockholders, except as provided in the plan or as may be reserved as aforesaid." Here the court entered appropriate orders to secure the execution of the plan and the termination of the proceedings. But the relative priority of participation was passed upon neither in the plan nor by the court. Instead, it was specifically reserved. And it was reserved for determination, as the parties saw fit to have it determined, by the New York courts without restriction by the federal adjudication. The parties were out of the federal bankruptcy court with their original rights modified by the terms of the reorganization plan. When they came before a New York court seeking a determination of their present rights, that court was obliged to ascertain whether any rights had been fixed by the reorganization plan and, if so, to enforce them. Rights not affected by the federal proceedings the New York court was free to decide according to New York law. The bankruptcy court had refused to fix the rights of the parties as to the participation of Prudence-owned Burnside participations, and expressly left them to be fixed by the New York court as a "Court of competent jurisdiction". Accordingly, it was for the New York Court of Appeals to define the governing New York law.

And since, in the circumstances of this case, New York law governs, we are not called upon to indicate, it hardly needs to be added, whether the result would be different were the federal rule for distribution to creditors applicable.

Affirmed.

Mr. Chief Justice STONE.

I concur in the result.

The relative priority of Prudence's participation in the bankrupt's estate in a 77 B reorganization is a federal right governed by federal not state law. *Prudence Corporation* v. *Geist*, 316 U. S. 89, 95. As the reorganization plan did not purport to alter that right, but merely provided that it should be determined by a court of "competent jurisdiction", I cannot conclude that the adoption of the plan contemplated or effected the alteration of the federal right by requiring it to be redefined in terms of the law of New York, or of any other jurisdiction, where the parties might happen to seek its adjudication.

The fact that a federal right is to be ascertained in a state rather than in a federal court does not make it any less the duty of the court to apply federal law. *Chesapeake & Ohio Ry. Co.* v. *Martin*, 283 U. S. 209, 212-213; *Awotin* v. *Atlas Exchange Bank*, 295 U. S. 209; *Brady* v. *Southern Ry. Co.*, 320 U. S. 476, 479, and cases cited; *Illinois Steel Co.* v. *Baltimore & Ohio R. R. Co.*, 320 U. S. 508, 511, and cases cited; *Steele* v. *Louisville & Nashville R. R. Co.*, No. 45, decided December 18, 1944, p. 9 of slip opinion. And a mere grant by the federal court of permission to the parties to litigate a federal question in a state court, is not a direction that the question be determined by state law, more than is a general statutory authorization for a suit in the state court on a federal right.

The state court has held that petitioner, the holder of mortgage participation certificates, is not entitled to share in the mortgage until the holders of other certificates, which petitioner has guaranteed, are paid in full. Its judgment should be affirmed, not because the plan called for determination of petitioner's rights in the bankrupt's estate by state rather than federal law, but because in the circumstances of this case the applicable federal law is the same as that which the state court has applied. Petitioner did not, as in the *Geist* case, acquire its interest in the mortgage as an original investment before it sold and guaranteed certificated shares in the mortgage, nor did it acquire its own certificates independently of the performance of its obligation as a guarantor of the certificates. Petitioner is here in the position of a subrogee of a claim whose payment it has guaranteed. For it acquired its claim to participate in the mortgage through performance of its guaranty, by purchase, after default, of the certificates of participation which it had guaranteed.

As we recognized in the *Geist* case, and were at pains to point out, 316 U. S., at p. 96, such a case is within the rule of *United States* v. *National Surety Co.*, 254 U. S. 73, 76; *Jenkins* v. *National Surety Co.*, 277 U. S. 258; *American Surety Co.* v. *Electric Co.*, 296 U. S. 133, "that a solvent guarantor or surety of an insolvent's obligation will not be permitted, either by taking indemnity from his principal or by virtue of his right of subrogation, to compete with other creditors payment of whose claims he has undertaken to assure, until they are paid in full."

Mr. Justice RUTLEDGE concurs in this opinion.